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CASES

ON

THE LAW OF EVIDENCE

SELECTED AND ARRANGED

BY

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CALLAGHAN & COMPANY
CHICAGO
1921

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PREFACE.

By the case method of instruction the student acquires a knowledge not only of the rules and principles of the law, but also of their application to particular facts; and the latter is quite as important as the former.

The chief criticism of this method of instruction is that too much ground has to be covered for the amount of knowledge acquired. This criticism applies with greater force to long cases. In the present volume the cases are short and confined to the points of Evidence involved. All matter contained in the reported cases not pertaining to Evidence has been eliminated.

Nearly all of the cases in this volume are American cases; and most of them have been recently decided. These features, it is believed, will be appreciated both by teachers and students.

Many of the cases contained herein contain brief discussions of English cases which enable the student to acquire a knowledge of the origin and historical development of the various rules and principles of Evidence and their exceptions.

Some topics in the law of Evidence require more extended discussion than others. Thus, the Rule against Hearsay and its exceptions, the Best Evidence Rule and the Parol Evidence Rule require extended discussion. Owing to this fact many cases herein pertain to these topics.

To the trial lawyer Evidence is the most important subject in the law curriculum. It is the one subject that he must have at the tip of his tongue. It comprises many rules and exceptions and should be taught in law schools for at least five hours a week for one semester.

T. W. HUGHES.

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Cases On Evidence

PART I.

PROVINCE OF THE COURT AND OF THE JURY.[1]

ALFRED FAIRBANK v. B. HUGHSON.

58 Cal. 314. (1881)

Appeal from a judgment for the defendant and from an order denying a new trial in the Superior Court of San Joaquin County.

McKEE, J. The principal issue in this case involved the genuineness of the signature of the defendant to the instrument in writing upon which the plaintiff sought to recover in the action.

On the trial of the issue the plaintiff put in evidence eight receipts which were admitted to have been signed by the defendant, and called a number of witnesses to testify as to the genuineness of the paper sued on, by comparison with the signatures of the receipts. In reply to which the defendant called one W. H. Taylor as an expert in handwriting, who, being examined as to his qualifications, testified that he had been a book-keeper for eight years in two banks in the city of Stockton. In that capacity he had examined signatures and writings more or less, although his business did not require him especially to examine them, and, as he was only a book-keeper, and had not been called upon to examine signatures, he did not consider himself to be an expert. Counsel for plaintiff thereupon objected to his testimony on the ground that he was not an expert.

The Court. "I shall hold it is for the jury to say how much he knows about it. I will admit the testimony."

[1] **Hughes on Evidence, p. 26.**

This was error. Whether one offered as an expert is qualified to speak as such, is a fact preliminary to his testifying as such, to be determined by the court at the trial. It cannot be referred to the jury. (Jones v. Tucker, 41 N. H. 546.)

Judgment and order reversed and cause remanded for a new trial.

Ross, J. and McKINSTRY, J., concurred.

HIGGINBOTHAM, executor, v. CAMPBELL.

85 Ga. 639. (1890)

New trial. Charge of court. Fraud. Practice. Before Judge Maddox. Floyd Superior Court. Sept. term, 1889.

BLECKLEY, Chief Justice. In this case, a deed of conveyance, made by a mother to her son, was attacked as having been procured by the son through fraud committed upon his mother. The object of the attack was to set aside and cancel the deed. The jury found in favor of the plaintiff. The court, on motion of the defendant, granted a new trial, and the plaintiff excepted.

In the trial of civil cases, the responsibility for the law of the case rests wholly upon the judge. The jury must take it from him, and as he expounds it, with no concern on their part for the correctness or incorrectness of his exposition. Instead of so instructing the jury, the judge charged them that they were the judges of the law and the facts which had been submitted to them. Whilst in one sense this was not absolutely incorrect, for, in civil as well as criminal cases, the jury apply the law to the facts, and exercise that degree of judgment upon it which is necessarily involved in doing so; still, such instructions, unattended with a caution to accept the law as announced by the court, might be misleading. The jury could understand them as implying the same functions on their part with reference to the facts, and knowing that it was upon them to ascertain and settle what the facts really were, they might think they had the same office to perform touching the law. They might conclude that they were to recognize as law that which they thought it was rather than that which the judge said it was. It is true that the danger of such mistake was not imminent, but that it existed at all, by reason of an inaccurate expression from the bench, might very properly render the judge desirous of an opportunity to correct it on a future trial,

especially if he had any doubt of the correctness of the verdict, in so far as it involved elements of law as distinguished from matters of fact.

Judgment affirmed.

AGNES CAIRNS, executrix, v. JOHN MOONEY.

62 Vt. 172. (1890)

Action, assumpsit. Plea, the general issue. Trial by jury, at the September Term, 1889. Powers, J., presiding. Verdict and judgment for the plaintiff. Exceptions by the defendant.

The plaintiff sued for the price of certain apples sold by her testator to the defendant. The defendant claimed that the quality of the apples was not according to the contract, and offered to so testify himself. To his testimony the plaintiff objected, for that the other party to the contract was dead. Thereupon the defendant insisted, and his evidence tended to show, that the contract was not made with the testator but with his son, acting as his agent. The court excluded the evidence.

TAFT, J. The defendant was not a competent witness, "unless the contract in issue was originally made with a person who is (was) living and competent to testify." The defendant claimed that the contract for the apples was made with Harvey Cairns, acting as agent for the testate, and who was present at the trial and testified. Conceding that the testimony of the defendant's witness tended to establish the fact of agency, the question was one for the court. The defendant insists that he should have been permitted to testify, and the question of agency submitted to the jury, and if they found it established, they should then consider the testimony of the defendant upon the various points upon which he gave testimony, and if they did not find the fact of agency proved, reject the testimony. It was a question of competency or incompetency of the defendant as a witness, and that question is always for the court, and should never be submitted to the jury. 1 Green. Ev. (14th Ed.) s. 49 and note a; 1 Tay. Ev. s. 21; *Bartlett v. Smith,* 11 M. & W. 483; *Reg. v. Hill,* 5 Eng. L. & Eq. 547; *Cook v. Mix,* 11 Conn. 432; *Holcomb v. Holcomb,* 28 Conn. 177; *Harris v. Wilson,* 7 Wend. 57; *Reynolds v. Lounsbury,* 6 Hill 534; *Dole v. Winslow,* 12 Met. 157; *McManagil*

v. Ross, 20 Pick, 99. In some jurisdictions it has been held that, in doubtful cases, it is not improper to refer the existence of the facts upon which the competency depends to the jury; and, in some instances, it is intimated that it should be done. *Hartford F. Ins. v. Reynolds,* 36 Mich. 502; *Johnson v. Kendall,* 20 N. H. 304; *Bartlett v. Hoyt,* 33 N. H. 151; *Dart v. Heilner,* 3 Rawle, 407; *Gordon v. Bowens,* 16 Penn. St. 226; *Haynes v. Hemsicker,* 26 Penn. St. 58.

Questions of fact affecting the admissibility of testimony often arise, and it would be very inconvenient, if not impracticable, to submit them to the decision of a jury. The testimony as to the competency of a witness, and that of the witness as to the issues upon trial, would all go to the jury with directions that if they found the witness incompetent, it would be their duty to disregard his evidence upon the main issues, which in many instances it might be impossible to do. Having heard the illegal testimony discussed by counsel, the confusion which would probably arise in separating the legal from illegitimate testimony would no doubt lead to the rendition of erroneous verdicts, with no relief for the unfortunate party; and certainly this should not be the rule in a jurisdiction where the admission of illegal evidence is not cured by a direction from the court to disregard it. *State v. Hopkins,* 50 Vt. 316; *State v. Meader,* 54 Vt. 126; *Hall v. Jones,* 55 Vt. 297; Rob. Dig. 700, pl. 55.

In Cook v. Mix, supra, the question was whether the witness had an interest in the event of the suit and the court said it "was a question of fact to be determined on the evidence before the court. It is claimed in the first place, that the judge mistook the law in not submitting this question to the jury, and this claim has been gravely urged before this court. It is sufficient to observe that the claim is unfounded as it is novel, that it has no support either in principle or authority, and is utterly incapable of being reduced to practice."

It is not by any means true that all questions of fact in a jury trial must be left to the jury; numerous instances where the court passes upon such questions can be readily called to mind, e. g., whether a witness is an expert; or a dying declarant entertained hopes of recovery; or a writing to be used as a test in comparison of handwriting is proved; or a witness has sufficient mental capacity to testify, or is the husband or wife of the party; or declarations are so far a part of the *res gestae* as to be admissible; or a confession was induced by threats; or a document has been duly or sufficiently stamped; or sufficient search has been made for a lost document to warrant the introduction of secondary evidence. Many other instances

might be given. In the beginning of a jury trial, suppose a woman is offered as a witness for the plaintiff and the defendant objects for that she is the wife of the plaintiff. The question is purely one of fact. Will anyone claim that her testimony should be given upon the main issues, and the question of whether wife or not be left to jury, and then if they find her to be the wife, discard her testimony, but if not, consider it? Conceive that in a suit in favor of several plaintiffs the question should arise in respect to each one. Well might the Connecticut court characterize the claim of the defendant as unfounded as it was novel. The court below not being satisfied from the evidence that the contract in issue was made with the agent of the testate, properly held the defendant incompetent.

Judgment affirmed.

COMMONWEALTH v. GEORGE A. CULVER et al.

126 Mass. 464. (1879)

Indictment on the Gen. Sts. *c.* 161, § 12, charging the defendants with breaking and entering, on March 27, 1876, the shop of George M. Crawford, at Ayer, with intent to steal.

At the trial in the Superior Court, before Allen, J., the government offered to prove confessions made by the defendant. The defendants objected to their admission, on the ground that they were made in consequence of offers of favor made to the defendants by the officer who arrested the defendants and had them in custody; that these offers were carried to the defendants by request of the officer, before the confessions were made; and that the confessions were induced by the offer.

At the suggestion of the judge, the government called as a witness the officer who made the arrest; and he denied that he made any offers of favor to the defendants, or had caused any offers of favor to be carried to the defendants by others. The defendants then offered to call five different witnesses to prove the truth of their claim, and asked the judge to hear them, and first to determine whether the confesssions ought to be received. The judge declined to admit the evidence at that stage of the case but admitted the confessions.

The jury returned a verdict of guilty; and the defendants alleged exceptions.

LORD, J. The only question which this case presents is whether it was error in the presiding judge to refuse to hear the evidence offered by the defendants, at the time it was tendered, relating to the inducements held out to the defendants for the purpose of obtaining the confessions offered in evidence by the government; and we think it was. There is undoubtedly a large discretion vested in the presiding justice at a trial, in reference to its conduct and to the order of proofs. In this case, when the evidence was offered by the government, it was objected to as incompetent. Its competency was a question of law, and was to be decided by the court. *Prima facie,* it was competent; but the defendants contended that it was incompetent by reason of certain extrinsic facts. It was for the defendants to establish those facts, and it was the duty of the presiding judge to ascertain whether they existed, before admitting the evidence. It appears by the bill of exceptions, that, when the confessions of the defendants were offered in evidence, they objected to such confessions, upon the ground "that they were made in consequence of offers of favor made to the defendants by the officer who arrested the defendants and had them in custody." If this were true, and the defendants could establish the fact, the confessions were incompetent evidence. It was the duty of the presiding judge to determine that fact, upon hearing all competent evidence upon it which was tendered by either party. In the absence of all evidence, the presumption is that a confession is voluntary; and when the party confessing objects that confessions are not voluntary, he is called upon to show, at least enough to rebut such presumption. Instead, however, of calling upon the defendants thus to repel the presumption, the presiding judge suggested that the officer be called by the district attorney; and he was called and denied having made offers of favor to the defendants to induce the confessions. The defendants then offered to call five different witnesses to prove the truth of their claim. The court declined to admit the testimony, "at that stage of the case, but admitted the confessions." That however, was the only stage of the case at which the evidence could be admitted for the purpose for which it was offered, to wit, to show that the proposed confessions were incompetent.

We are aware that it is not an uncommon practice in the trial of criminal causes, when confessions of a defendant are offered in evidence, and objected to upon the ground that they were improperly obtained, for the presiding judge to allow the confessions, and all the evidence bearing upon the manner in which they were obtained,

to be submitted to the jury, either to be rejected by the jury wholly, or to be allowed such weight as under the circumstances the jury deem it proper to give them. This, however, as we understand it, is rather by consent than otherwise, neither party desiring to take the decision of the presiding judge upon the question of competency. There may be, however, and commonly are, two questions: first, the competency of the evidence, and, secondly, the weight of the evidence. The former is always a question of law, the latter is always a question of fact. The prisoner has always the right to require of the judge a decision of the competency of the evidence; and even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to give no weight to it, because of the circumstances under which the confessions were obtained. In the case at bar, however, the counsel for the prisoners insisted upon their right to have the judge decide upon the competency of the evidence, and tendered evidence of its incompetency; this evidence it was the duty of the presiding judge to hear. The evidence having been tendered at a stage of the case in which it was the duty of the defendants to offer it, and the presiding judge having refused to hear it at that time, the exception to his refusal to hear it must be

Sustained.

EDWIN F. CONELY v. HENRIETTA McDONALD.

40 Mich. 150.

Appeal from an order of the Probate Court admitting to probate an instrument purporting to be the last will of Firth A. McDonald. The plaintiff in error was named as executor in this instrument, and was designated by the Probate Court as the representative on the appeal, of all the parties interested. The Circuit Court directed the framing of an issue, and the plaintiff in error appeared as proponent of the instrument, and alleged that it was the last will and testament of Firth A. McDonald, and that at the time of its execution he possessed the necessary lawful qualifications to its due execution by him. The appellant and contestant, who was the widow of McDonald, pleaded the general issue with notice that she would show that the instrument relied on was not her husband's last will; that its execu-

tion was obtained by fraud and undue influence of Joel McDonald and others; that Firth A. McDonald was of unsound mind and memory when he signed and executed it, and that its provisions were contrary to the just and legal rights of the appellant. The jury found that the instrument propounded was not the last will and testament of Firth A. McDonald, and it was so adjudged. The proponent Conely brought error.

MARSTON, J. Under the issues as framed in this case, evidence tending to show undue influence was competent and admissible in evidence. The court in charging the jury, being of opinion that upon this branch the testimony did not tend to show undue influence, withdrew that question from their consideration.

After the evidence was all in, counsel for proponent requested the court to instruct the jury, 1st, "There is no evidence in the case tending to show that the testator when he executed the will in controversy was in any respect of unsound mind, and the jury are therefore bound to assume that he was fully competent to make such a will;" 2nd, "Upon the whole case the verdict must be for the proponent." These requests were refused and to the charge as given no exceptions were taken.

It was not seriously disputed on the argument but that there was testimony in the case tending to show that the testator did not have sufficient capacity to make the will in question. It was, however, urged very strenuously that there was not sufficient evidence, all of which is returned, to sustain the verdict in this case, and consequently that the second above request to charge should have been given.

We had supposed that the law was well settled in this State as to the duty of the court under such circumstances. It is true the question may not have been discussed at length, and the authorities bearing thereon cited in any one particular case, but the question has frequently been referred to and acted upon in cases where perhaps, at least in some of them it was of minor importance. As the question is one of importance in this case, and has been ably argued and authorities cited, more especially the decisions of the English courts and of the Supreme Court of the United States, it may be well to consider the matter at some length and see what the true rule is or should be in all such cases, and in the light thereof determine the controversy in this case. In England the rule is laid down that a scintilla of evidence clearly would not justify the judge in leaving the case to the jury; that there must be evidence on which they might

reasonably and properly conclude that the issue was proven. See *Ryder v. Wombell,* Law Rep., 4 Exch., 38, where many of the cases are collected and citations therefrom given.

In *Hickman v. Jones,* 9 Wall., 201, the court instructed the jury to acquit the defendants. Swayne, J., said: "There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned judge mingled the duty of the court and jury, leaving the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts—and the facts themselves—are for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

Assuming that the English rule as already stated, which was followed and approved in *Commissioner v. Clark,* 94 U. S. 284, means just what is said, that a scintilla of evidence would not justify the judge in leaving the case to the jury, I can fully concur therein. Such a rule would be no more than what has repeatedly been followed in this state. In *Kelly v. Hendrie,* 26 Mich. 256, it was said: "If, upon any point essential to a recovery, the evidence bearing on it is open to but one meaning, and that meaning is plainly and necessarily adverse to the plaintiff, then he has no ground of complaint" if the court takes the case from the jury. There may be a "scintilla" in other words a "spark" or "the least particle" of evidence in a case, and yet fall far short of what is essential. It frequently happens on the trial of a cause that proof of one fact has of itself a tendency to

prove others which are material and necessary to establish the cause of action, while in other cases each fact is so separate and distinct that proof of one raises no presumption whatever in support of another.

As was said in *Perrot v. Shearer,* 17 Mich. 54, whether evidence bearing upon a certain point tends to establish it or not, may depend not alone upon that particular item of evidence, but upon that considered in its relation to other evidence which may so far qualify and explain it that it shall have no tendency whatever to prove the position for which it was offered, and which if it were the sole evidence in the case it might appear to establish. The duty to examine, weigh and compare in these cases is not entrusted to the judge; these are matters lying within the peculiar province of the jury.

In *Berry v. Lowe,* 10 Mich., 15, where the question came up on writ of error, it was said: "If the alleged error is a total want of evidence to prove some fact necessary to sustain the judgment, the court will look into the testimony to see whether there was such evidence or not. If there was, it will not weigh it, or inquire into its sufficiency, but affirm the judgment. If the return shows no such evidence, and it appears all the testimony before the justice has been returned, the judgment will be reversed on the ground that the justice erred, in law, in rendering the judgment he did without such evidence." Or as was said in *Hyde v. Nelson,* 11 Michigan, 357, where the question came up on *certiorari,* "It is only when there is an entire absence of proof upon some material fact found, that such finding becomes erroneous as a matter of law."

The doctrine laid down in these cases has always been strictly adhered to in this State. In addition to the cases already cited, see *Blackwood v. Brown,* 32 Mich., 107, and authorities there referred to; *Maas v. White,* 37 Mich., 130, and Elliott v. Van Buren, 33 Mich., 52, where it was said to be "not in the province of an appellate court to consider the amount of the verdict or the weight of the evidence, the court of trial may set aside a verdict which violates justice, and it is to that tribunal that parties must apply for relief against excessive damages or any other of the wrongs for which it may be right to grant a new trial. We are bound in all cases to assume that the jury have done no legal wrong when acting within their province."

It seems to me that this is the only safe rule. Under our system of jurisprudence, the jury is called to pass upon the facts.

It is not only their privilege but their right to judge of the sufficiency of the evidence introduced to establish any one or more facts

in the case on trial. The credibility of witnesses, the strength of their testimony, its tendency and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. The jury should be left entirely free to act according to their own judgment. Where there is a total defect of evidence as to any essential fact, or a spark, the least particle, a scintilla as it is termed, the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may in the opinion of the trial court or the Appellate Court be slight, inconclusive, and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight.

When there is a total want of evidence upon some essential fact, but the jury nevertheless find such fact, the finding is erroneous as matter of law, but when there is slight evidence in support thereof a finding thereon would be one of fact, upon which men might differ in opinion, but for a court to attempt the correction thereof upon writ of error would be a correction of errors in fact and not in law, a power which this court does not possess.

We are of opinion that there was evidence in this case which tended to prove the issue made. The weight and effect thereof was rightly left to the jury under proper instructions, and their finding we have no power to review.

The proceedings must be affirmed. The cause, however, was properly brought into this court, and the costs should be paid out of the estate in all the courts. It must be certified accordingly to the circuit and probate courts.

The other Justices concurred.

GRACE MICHAEL, *Appellee*, v. O. E. MATSON, *Appellant*.

81 Kan. 360. (1909)

Appeal from Harvey District Court; Peter J. Galle, Judge. Opinion filed Dec. 11, 1909. Reversed.

MASON, J. O. E. Matson while mayor of Burrton, verified a com-

plant charging M. M. Michael and Grace Michael, his wife with violating the prohibitory law, and caused their arrest. The county attorney refused to prosecute and the case was dismissed. Grace Michael brought action against Matson for malicious prosecution and recovered a judgment for $600, from which he appeals.

We think the verdict must be set aside for the reason that the instructions were so worded as naturally to lead the jury to understand that they were the judges of what constituted probable cause, and their findings show that they probably acted upon that understanding. There is some conflict on the subject, but the great preponderance of authority favors the view that the question of what facts are sufficient to constitute probable cause is one of unmixed law. (26 Cyc. 107; 19 A. & E. Encycl. of L. 669.) Courts which acquiesce in the general statement of the rule sometimes refuse an unqualified application of it. For illustration, it was approved in Fagnan v. Knox, 66 N. Y. 525, Erb v. German American Ins. Co., 112 Iowa, 357, and Hamilton v. Smith, 39 Mich, 222, 227, but denied application in Heyne v. Blair, 62 N. Y. 19, Donnelly v. Burkett, 75 Iowa, 612, and Davis v. McMillan, 142 Mich. 391. This court, however, has consistently adhered to it and given it practical effect. (Drumm v. Cessnum, 58 Kan. 331; Railway Co. v. Allen, 70 Kan. 743.) In the Drumm-Cessnum case it was said:

"Where the facts are disputed, it must be left to the jury to determine what the facts are, but the court should instruct what facts amount to probable cause for an arrest and what do not. The court should summarize the claims of the parties, and state to the jury what basis of fact must exist to show probable cause, and what will sustain the claim of a want of probable cause." (Page 333)

In the present case the court gave this instruction:

"You are instructed that to constitute probable cause for criminal prosecution there must be such reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves, to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged, and in this connection you are further instructed that a mere belief that an innocent person is guilty of a crime is not alone sufficient to justify causing his or her arrest. The facts must be such as would justify an ordinary, intelligent and reasonably prudent person in entertaining such belief. Whether in this case such facts had come to the knowledge of the defendant at the time he entered the complaint against the plaintiff is a question of

fact for the jury to determine, from a preponderance of the evidence."

This definition of what constitutes probable cause is doubtless sufficiently accurate, although the use of "cautious" in place of "prudent" has been criticised. (McClafferty v. Philip, Appellant, 151 Pa. St. 86.) As it is not the province of the jury to determine what circumstances would induce a reasonably prudent man to believe another guilty of a crime, there seems to be no purpose in the giving of an abstract instruction on the subject.

"Inasmuch as the question of probable cause is always to be determined by the court from the facts in each particular case, it would seem unnecessary to give to the jury any definition of the term or any instruction upon abstract propositions relating to this subject. These abstract rules will guide the court in determining the question, but are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict shall be rendered." (Ball v. Rawles, 93 Cal. 222, 233.)

Nevertheless such an instruction is ordinarily not prejudicial, where the charge includes a statement of what facts would amount to probable cause in the case on trial. (Jonasen v. Kennedy, 39 Neb. 313, 319, 320.) The difficulty here is that the last sentence of the instruction quoted, although open to a different construction, naturally tended to lead the jury to understand that they were to decide for themselves whether the facts known to the defendant when he caused the plaintiff's arrest were such as would justify an ordinarily prudent person in believing her guilty. This misleading tendency, if not corrected by a clear and accurate statement of what concrete facts would justify a reasonable belief of guilty, is a ground for reversal, unless it can be said from the record that the jury were not in fact misled. The inference from the findings, however, is to the contrary.

Belief that probable cause exists for the arrest of a person is obviously a different thing from a belief that he is guilty. The latter is often said to be an essential ingredient of probable cause, although many of the definitions omit it. (26 Cyc. 29; 19 A. & E. Encycl. of L. 663; 6 Words and Ph. Jud. Def. p. 5620 *et seq.;* note Am. St. Rep. 140.) The former has no materiality in this kind of an action unless as bearing upon the question of malice. A man may cause an arrest under a reasonable belief, founded on abundant evidence that the accused person is guilty. Yet he may suppose, through ignorance

of the law, that "probable cause" does not exist, and that if he fails to procure a conviction he is answerable in damages. Plainly he would not be liable under such circumstances. Probable cause would exist in fact and would afford him a perfect defense, whatever might be the result of the prosecution. The instruction given in this respect was clearly erroneous and under the circumstances of the case must be deemed to have been prejudicial.

The judgment is reversed and a new trial ordered.

Notes. Very generally, issues of law must be decided by the court. In a few states, however, including Connecticut, Maryland, Indiana, Illinois and Louisiana, issues of law, as well as issues of fact, are, *in criminal cases*, decided by the jury. This is owing to provisions in the state constitutions or statutes.

Mixed issues of law and fact are for the jury to decide under proper instructions by the court. The following are examples of this class of issues: whether a certain article constitutes baggage; whether certain real estate constitutes a homestead; whether a certain instrument is a deadly weapon; whether certain goods are necessaries; whether a certain homicide was committed in self-defense; whether a husband has abandoned his wife; whether a certain act performed on Sunday was a work of charity or necessity.

The distinction between an issue of fact and a mixed issue of law and fact is this: The subject-matter of the former has its natural meaning, and is not governed by rules of law. Hence no occasion arises for instructions by the court. Whereas the subject-matter of the latter is within the definition of some rule of law, and for this reason possesses certain attributes other than those possessed by it naturally. Hence the court is required to instruct the jury as to the legal definition of the term.

Upon principle, the question of want of probable cause, in an action for malicious prosecution, is a fact for the jury to decide. But, on the ground of public policy, the court decides it. This anomaly is to encourage persons to make complaints against criminals and to protect them when sued for malicious prosecution. In England the reason for the anomaly is much greater than in this country, but our courts follow the English decisions.

Cases arise where courts are bound, owing to insufficiency of the evidence, to withdraw them from the jury. Others arise where courts may, in their discretion, withdraw them from the jury. But, as stated in Hughes on Evidence, pages 27, 28, "This function is one which should be exercised only in very clear cases. It should never be exercised when the evidence, if material, is conflicting; nor when impartial minds might honestly and reasonably draw different conclusions therefrom. If the facts are undisputed or admitted, whether such facts constitute a legal cause of action, or a legal defense, is a question for the court to decide. To justify a withdrawal of the case from the jury, on the request of one of the parties, the evidence of the opposite party must be assumed to be true and all legitimate inferences therefrom must be in his favor. A mere scintilla of evidence in support of any theory of the case is not of itself sufficient to prevent a withdrawal. If at the close of the plaintiff's case there is no evidence at all to prove a mate-

rial fact essential to recovery, the court, on the request of the defendant, is bound to instruct the jury to find a verdict for the defendant. If, however, such request is not made until after the defendant has introduced evidence which tends to prove such material fact, the court may refuse to so instruct the jury. Where there is any material evidence tending to prove all the material requisites to a recovery the trial judge is bound to submit the case to the jury without regard to what, at the time, he may think he would do on a motion for a new trial."

The usual mode of raising the question of withdrawal of the case from the jury is by motion for a nonsuit, or by a request that the court instruct the jury to return a verdict in favor of a certain party. In a few states it may be done by demurring to the evidence.

PART II.

WITNESSES.

COMPETENCY.[1]

JEREMIAH ARNOLD v. ESTATE OF SAMUEL ARNOLD.

13 Vt. 362. (1841)

This was an appeal from the decision of commissioners, appointed by the Probate Court to receive, examine and adjust all claims and demands against the estate of Samuel Arnold, deceased, of which estate David Arnold and Nancy Arnold were administrators.

The plaintiff declared in an action of book account against said estate. Judgment to account was rendered in the County Court and auditors were appointed, who reported that the parties appeared before them, and the plaintiff exhibited his account against said estate, and offered to prove the same by his own oath; but, it appearing that the plaintiff did not believe in the existence of a Supreme Being, the auditors decided that his testimony was inadmissible, and he was not permitted to testify. The counsel for the plaintiff then insisted that the plaintiff was a competent witness to testify to said account under the statute laws of this state, and requested the auditors to administer an oath or affirmation to the plaintiff, agreeably to the second section of chapter 109 of the Revised Statutes. But the auditors decided that such oath or affirmation ought not to be administered.

The opinion of the court was delivered by

REDFIELD, J. The question which we are now for the first time called to decide, is one of some little delicacy, and of very great importance. It is one of delicacy, because those, who may think themselves affected by it, are liable to feel aggrieved by a determination which excludes them from giving testimony, even in their own cases, and by misapprehending, to some extent, the grounds of the exclusion, might possibly consider it rather a matter of punishment than misfortune, and thus feel disposed to resist the rule rather than reform either their habits or belief. On the other hand, some very

[1] Hughes on Evidence, p. 265.

conscientious persons would feel, no doubt, that where the rule was so narrowed down, as to admit Pagans, Jews, Mahometans, Deists, Universalists, and especially members of the Greek and Roman communions, that all religion was desecrated and trodden under foot. Under these circumstances, we feel solicitous that the reasons of this decision should be understood, in order that the question here decided may be put at rest, until the law-making power shall see fit to change the rule, which, judging from the past, is not likely soon to occur.

It is hardly necessary here to repeat, for the hundredth time, the very obvious remark, that in deciding questions upon these seats, we have not to inquire what, upon principles of expediency or propriety, the rule of law should be, but what *is it?*

Almost all sober, and especially religious men, have for many years, in ruminating upon reforms in our system of jurisprudence, sincerely regretted the very unnecessary frequency of oaths; and not a few men of that same class have even questioned the necessity of resorting to the sanction of an oath, in any department of the civil administration. It is doubtless true, that there exist very grave reasons in favor of adopting even the latter opinion; but such an important step in simplifying the system of municipal law and government, and one so untried, could hardly be taken, except upon the most mature consideration, and the most thorough conviction of its necessity.

In regard to oaths, I think it will be conceded on all hands that some kind of religious belief has always been considered indispensable, in order to their binding obligation upon the conscience of the one sworn. At times it has been deemed an essential pre-requisite that the person sworn should believe in all the articles of the Christian faith. Such were some of the early English decisions. And Mr. Starkie, in the last edition of his work on evidence, says, "All persons may be *sworn,* who believe in the existence of God, in future state of rewards and punishments, and in the obligation of an oath;" thus clearly indicating that all this is necessary. But as Lord Mansfield, in delivering the opinion of the court in the case of Atcheson v. Everitt, Cowper, 389, well says,—"Since the case of Omichund v. Barker, 1 Wilson, 84 (1 Atk. 21. Willes, 550.) and another case of great authority determined since, the nature of an appeal to Heaven, *which ought to be received as a full sanction to evidence,* has been more fully understood." The case of Omichund v. Barker was that of the depositions of certain Gentoos, sworn according to the ceremonies of their religion, by stooping down and touching the shoes

of their priests. The other case referred to by the learned judge above, was that of a Turk, sworn upon the Koran, Strange, 1104. A Jew, too, may be sworn upon the Pentateuch, Vernon, 263, which was the case of an answer in chancery. It is said in the report of the case of Omichund v. Barker, "that, at this day, it seems to be settled, that infidelity of any kind doth not go to the competency of a witness." This must mean *infidelity*, as contradistinguished from *Christianity;* for it is well settled that an atheist cannot be sworn.

In support of the proposition that an atheist cannot be sworn, we need only refer to the history of oaths, and the nature of an oath. An oath is well defined to be "a solemn invocation of the vengeance of the Deity, if the person sworn do not regard the requisitions of the oath.

The earliest statute, which I have been able to find upon the subject of blasphemy, was passed February, 1779. The phraseology of the statute, and the extreme penalty affixed, indicate the severity and sincerity of the age. One now almost shudders to reflect how short a period of time intervenes between us and them. That section is in these words,—"That if any person shall blaspheme the name of God, the Father, Son, or Holy Glost, with direct, express presumption, and high handed blasphemy, or shall curse in the like manner, *such person shall be put to death.*" The next statute passed upon this subject is much in the same terms, except the penalty is whipping and sitting in the pillory. This bears date 1787. The next statute punishing blasphemy is found in the revision of 1797, and is in these words: "If any person shall publicly deny the being and existence of a God, or of the Supreme Being, or shall contumeliously reproach his providence and government, he shall be deemed a disturber of the public peace and tranquility, and a corruptor of public morals and good manners," &c. The punishment was by fine and security for good behavior. This statute, so far as regards the definition of the offense and the penalty, is literally re-enacted in the late revision. Hence it is not true, as has been sometimes said, that to require of a witness a belief in the existence of a Supreme Being, was at variance with the whole spirit and tenor of our constitution and laws. I trust, indeed, that the recognition of the existence and providence of the Supreme Being is a principle deep laid in the very foundation of our institutions. "And if there be," in the language of Chief Justice Willes, "any such infidels, who either do not believe in a God, or who do not think he will reward or punish them, either in this world or the next, they cannot be witnesses, for this plain reason,

that an oath cannot possibly be any tie or obligation upon them."

I shall not stop to inquire how far, in this case, the witness being a party and admitted to testify by statute, a different rule should apply from the ordinary case of witnesses who have no interest in the case. It is obvious that the statute was only intended to remove the objection of interest. Hence it is plain, that a party who is made a witness by statute is to become such under the same requisitions and restrictions as any other witness. He must be of sane mind, of sound memory, of suitable age, willing to be sworn, and capable of taking an oath. It would not be pretended, I presume, that a person convicted of any infamous crime would, nevertheless, be a competent witness, in his own action of account and book account.

Judgment affirmed.

WHEELER v. UNITED STATES.

159 U. S. 523. (1895)

BREWER, J. On January 2, 1895, George L. Wheeler was by the Circuit Court of the United States for the Eastern District of Texas adjudged guilty of the crime of murder and sentenced to be hanged. Whereupon he sued out this writ of error. Three errors are alleged: First, that the indictment is fatally defective in failing to allege that the defendant and the deceased were not citizens of any Indian tribe or nation. It charges that they were not Indians nor citizens of the Indian Territory. The precise question was presented in Westmoreland v. United States, 155 U. S. 545, and under the authority of that case this indictment must be held sufficient.

Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. Moore v. United States, 150 U. S. 57; Holder v. United States, 150 U. S. 91; Blitz v. United States, 153 U. S. 308.

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to

him on his *voir dire,* said among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and in response to a question as to what the clerk said to him, when he held up his hand, he answered, "don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not by reason of his youth, as a matter of law, absoluely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of the matters cannot be photographed into the record one decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In *Brasier's case* (1 Leach, Cr. L. 199,) it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See also, 1 Greenleaf's Evidence, Paragraph 367; 1 Wharton's Evi-

dence, Paragraphs 398, 399, 400; 1 Best on Evidence, Paragraphs 155, 156; State v. Juneau, 88 Wis. 180; Ridehour v. Kansas City Cable Company, 102 Mo. 270; McGuff v. State, 88 Ala., 147; State v. Levy, 23 Minn., 104; Davidson v. State, 39 Texas 129; Commonwealth v. Mullins, 2 Allen, 295; Peterson v. State, 47 Ga., 523; State v. Edwards, 79 N. C. 648; State v. Jackson, 9 Ore., 457; Blackwell v. State, 11 Ind. 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that under the circumstances of this case the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and, therefore, there was no error in admitting his testimony. These being the only questions in the record, the judgment must be

Affirmed.

STATE v. JOHN EDWARDS.

79 N. C. 648. (1878)

Indictment for Murder tried at Spring Term, 1878, of Johnston Superior Court, before Seymour, J.

The prisoner was charged with killing of Kader J. Ballard.

The first witness for the State was Ella Ballard, a daughter of the deceased, aged at the time of the trial six and a half years. The presiding judge examined this witness on the question of competency on the second day of the term and being then of opinion that she had not sufficient religious instruction, advised the solicitor not to send her be-

fore the grand jury. A true bill was however found upon the evidence of another witness. Upon the trial which took place a few days afterwards, the judge examined her, and she then gave the ordinary answers to the ordinary questions put in such cases,—such as that God made her, that He would punish her if she told a falsehood; that she was sworn to tell the truth and would be punished if she did not do so. She was further examined in regard to general intelligence, and the Court was of the opinion that she was a child of more than usual intelligence for one of her age, and that she fully understood what was said to her, and the nature of her answers. It appeared that she had received religious instruction from her mother during the week the court was in session. The prisoner objected to admission of her testimony, objection overruled, and the prisoner excepted. The witness then testified, that she was six years old, named Ella, her father was dead, John Edwards killed him, her father was pulling fodder in the field when she first saw prisoner getting over the fence, he went where her father was and stopped, her father said to him, "how are your folks?" he said her father had cheated him, he had a gun and shot her father with it (describing the manner in which the gun was held) and then went off through the field to the woods. Witness pointed out the prisoner after looking around the court room, and said she knew him, had seen him often. One Joyner testified that she told him the same story on the day of the homicide, as the one related by her on the trial, and that deceased was found lying in said field and that tracks led to the woods. Another witness testified that she heard the report of the gun, that witness, Ella, came running to deceased's house, and upon being asked what was the matter said that John Edwards had killed her father. This was also corroborated by another witness.

After the testimony was closed, the court adjourned for supper; the jury were kept together, but were not instructed that they should not converse with any one or among themselves about the case; nor was the court requested to give such instruction, nor was it suggested that any one had communicated with the jury or that they had discussed the case; and for failure to instruct as aforesaid, the prisoner moved for a new trial, which motion was overruled. There was a verdict of guilty. Judgment. Appeal by prisoner.

READE, J. Formerly the age at which infants might be examined as witnesses was almost arbitrary. They were not regularly admissible under fourteen, subject to exceptions. At one time it was a general rule that none could be admitted under nine years, very few under ten. Gilb. Ev. 44; 1 Hale P. C. 302; 2 1b 278; 1 Phil. Ev. But of late

years since the means and opportunities for the early cultivation of the intellect have multiplied, a more reasonable rule has been adopted, and age is not the test, but the degree of understanding which they possess, including their moral and religious culture. 1 Phil. Ev., 1 East P. C. 448; 1 Leach 190; Roscoe Cr. Ev. 106n. So formerly, deaf and dumb persons were classed with idiots, and were incapable of crime, and incompetent as witnesses; but since the facilities for educating them, the rule is abrogated.

In the case of infants where there was sufficient capacity to understand the transaction and to communicate it, but not sufficient moral and religious impression to comprehend the obligation of an oath, time has been allowed to make the impression and to cultivate the conscience. 1 Leach, 199, 430.

There being now no arbitrary rule as to age, and it being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly if not entirely to the discretion of the presiding judge. State v. Manuel, 64 N. C. 601. It may be stated however that a child of tender years ought to be admitted with great caution; and where there is doubt it ought to be excluded. The formal answers to the usual questions,— who made you? what will become of you if you swear to a lie? and the like are so easily taught, that much more ought to be required. The capacity of the child may be ascertained not only by examining it, but other persons who have had the care of it.

Although the capacity of the child in this case is not for our consideration, yet it is gratifying to find upon our examination of the testimony, that it was sensible and clear, and that it was corroborated where corroboration could be expected by other evidence. We cannot say that there was error in admitting it.

Judgment affirmed.

REGINA v. SAMUEL HILL.

5 Cox C. C. 259. (1851)

Statement of Case: COLERIDGE, J. This prisoner was tried before me, assisted by my brother Cresswell, at the last February Sittings of the Central Criminal Court, for the manslaughter of Mose James Barnes. He was convicted, but a question was reserved for the opinion

of the Court of Appeal as to the propriety of having admitted a witness of the name of Richard Donelly on the part of the prosecution.

The deceased and the witness were both lunatic patients in Mr. Armstrong's Asylum, at Camberwell, at the time of the supposed injury, and they were at that time placed in a ward called the infirmary. It appeared that a single sane attendant (the prisoner) had charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients, of whom the witness Donelly was one.

LORD CAMPBELL, C. J. I am glad this case has been reserved, for the matter is of great importance, and ought to be decided. However, after a very learned argument, which I have heard with a great deal of pleasure, I entertain no doubt that the rule is as laid down by Parke, B., in the unreported case that has been referred to, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind, and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony. Various authorities have been referred to, which lay down the law, that a person *non compos mentis* is not an admissible witness. But in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration. The just investigation of the truth requires such a course as has been pointed out to be pursued, and in the peculiar circumstances of this case, I should have adopted the course which was taken at the trial. Nothing could be stronger than the language of the medical witnesses in this case, to show that the lunatic might be safely admitted as a witness. It has been contended, that the evidence of every monomaniac must be rejected. But that rule would be found at times very inconvenient for the innocent as well as for the guilty. The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest. In a lunatic asylum, the patients are often the only witnesses to outrages upon themselves and others, and there would be immunity for offenses committed in such places, if the only persons who can give information were not to be heard.

ANDERSON, B. I quite agree that it is for the judge to say whether the person called as a witness understands the sanction of an oath, and for the jury to say whether they believe his evidence. Here the account of the lunatic himself, and the evidence of the medical witnesses show that he was properly received as a witness.

COLERIDGE, J. This is an important case. We have been furnished, during the argument, with rules drawn from the older authorities against the admissibility of a lunatic witness, which are stated without any qualification. It was not necessary for the decision of those cases that the rule should be qualified, and in former times the question of competency was considered upon much narrower grounds than it is at present. The evidence in this case left the matter thus; there was a disease upon the mind of the witness, operating upon particular subjects, of which the transaction of which he came to speak was not one. He was perfectly sane upon all other things than the particular subject of his delusion. As far as memory was concerned, he was in the position of ordinary persons, and upon religious matters he was remarkably well instructed, so as to understand perfectly the nature and obligation of an oath. If it had appeared, upon his evidence, that his impressions of external objects were so tainted by his delusion that they could not be acted upon, that would have been a ground for the jury to reject or give little effect to his evidence. But this was a matter for them to determine.

PLATT, B., concurred.

TALFOURD, J. If the proposition, that a person suffering under an insane delusion cannot be a witness, were maintained to the fullest extent, every man subject to the most innocent unreal fancy would be excluded. Martin Luther believed that he had had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine, according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences.

Conviction affirmed.

HARTFORD v. PALMER.

16 Johns. (N. Y.) 143. (1819)

IN ERROR, on *certiorari* to a Justice's Court.

In this case a verdict and judgment were rendered for the defendant below, on which the plaintiff below brought a *certiorari;* and the only question arising on the return was, whether the justice ought to have refused to swear a witness, who was, when offered to testify, in a state of intoxication.

PER CURIAM. We are of opinion, that the justice decided correctly in refusing to swear the witness. *Peake* lays down this general proposition, which cannot fail to command the assent of all mankind, "that all persons who are examined as witnesses, must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, *idiots* and *lunatics,* while under the influence of their malady, not possessing this share of understanding, are excluded." This principle, necessarily, excludes persons from testifying, who are besotted with intoxication, at the time they are offered as witnesses; for it is a temporary derangement of the mind; and it is impossible for such men to have such a memory of events, of which they may have had a knowledge, as to be able to present them, fairly and faithfully, to those who are to decide upon contested facts. A present and existing intoxication, to a considerable degree, utterly disqualifies the person so affected, to narrate facts and events in a way at all to be relied on. It would, we think, be profaning the sanctity of an oath, to tender it to a man who had no present sense of the obligations it imposed. Indeed, it would be a scandal to the administration of justice, to allow, for a moment, the rights of individuals to be jeopardized by the testimony of any man laboring under the beastly sin of drunkenness. The return does not state the degree of intoxication which the justice considered sufficient to exclude the witness but we are to presume, that it was evident and palpable; and every court must necessarily have the power to decide, from their own view of the situation of the witness offered, whether he be intoxicated to such a degree, as that he ought not to be heard; nor can this lead to any improper consequences; for if the witness was not so intoxicated, the justice would be responsible in an action for a false return. We cannot withhold our approbation of the firmness which the

magistrate has evinced on this occasion, in refusing to administer an oath to a witness thus circumstanced.

Judgment affirmed.

STATE v. DE WOLF.

8 Conn. 93. (1830)

This was an indictment against the prisoner, Thaddeus K. De Wolf, for an attempt to commit a rape on the body of Celestia Bull, on the 15th of June, 1828.

The cause was tried at Litchfield, February term, 1830, before Peters, J.

On the trial, Celestia Bull, a person deaf and dumb from her infancy, was sworn as a witness, and testified to the principal facts in the case, by signs, which were interpreted to the court and jury, by William W. Turner, a teacher in the American Asylum for the education of the deaf and dumb, who was duly sworn for that purpose, and was also sworn as a witness. Mr. Turner testified, that Celestia had resided in the Asylum about five years, and was well acquainted with the language of signs, and capable of relating facts correctly in that manner; that she could also read and write, and communicate her ideas imperfectly by writing. The prisoner objected to her testifying in this manner, and claimed that she ought to give her testimony in her own words in writing. The judge overruled the objection, and admitted her to testify in the manner stated.

After the prisoner had cross-examined Celestia, and asked her many questions relative to the principal fact charged in the indictment some of which tended to discredit her evidence, but before any attempt on his part to discredit her testimony otherwise than by such cross-examination, the state's attorney offered Polly Rowley, as a witness, to prove that Celestia had previously told to her the same story, which she had now testified in court. To this the prisoner objected, but the judge admitted her testimony; which proved the fact for which it was offered.

The jury having found the prisoner *guilty*, he moved for a new trial.

DAGGETT, J. Several objections were made at the trial, against testimony offered by the public prosecutor, which appear on the motion, and are now urged as reasons for granting a new trial. They will be considered in the order presented by the counsel for the prisoner.

1. The supposed victim of the outrage of the prisoner, was deaf and dumb. She was sworn, and testified by a sworn interpreter, an instructor in the Asylum for the deaf and dumb, through certain signs adopted as a medium of communication, by that class of persons. It was objected, by the prisoner, that as it appeared by the testimony of the interpreter, that "she could read and write and communicate her ideas imperfectly by writing;" and it further appeared that "she understood the language of signs, and was capable of relating facts correctly, in that manner;" she ought to testify in her own words in writing. The judge very properly overruled the objection. The bare statement of the objection, overthrows it. She was capable of relating facts *correctly* by signs; she could read and write, and communicate her ideas *imperfectly*, by writing. The objection thus viewed, presents this absurdity, that the court erred in resorting to the most perfect mode of ascertaining the truth. The mode of examination adopted by the court, was the next best mode to an oral examination, which for many obvious reasons, is preferable to an examination in writing, but which could not be had in this case, on account of an infirmity in the witness. I see no ground for this objection.

New trial granted on other grounds.

WILSON v. SHEPPARD.

28 Ala. 623. (1856)

This action was brought in August, 1853, by Mrs. Harriet E. Wilson, the appellant, who is the wife of Samuel W. Wilson, to recover damages for the defendant's conversion of several buggies and other articles of personal property, which the plaintiff claimed as part of her separate estate.

WALKER, J. The incompetency of husband and wife to testify for or against each other, unless in a few excepted instances, has its foundation not merely in the identity of their legal rights, but in a wise public policy. No abandonment, or intention to abandon that policy, is indicated by the statutes securing to married women their property separately from their husbands. There is nothing in those statutes from which we can infer a legislative purpose to mar the sacred confidence of married life, and to open the door for broils and dissension, by permitting husband and wife to testify for or against each other. That the

rule which renders the husband and wife incompetent witnesses for or against each other is abolished, cannot result from the severing of their pecuniary interests to a certain extent, because the rule was not founded upon the identity of those interests.

In some cases, an agent is a competent witness, notwithstanding his interest in the event of the suit, from the necessity of the case—Bean v. Pearsall, 12 Ala. 592. But this exception to the general rule "should never be allowed in a cause which involves the fraud, negligence or tortious act of the agent." Griggs v. Woodruff, 14 Ala. 13. In this case the question whether the husband has made a fraudulent transfer to his wife, is involved; and therefore, conceding that there is an analogy between the objection to competency for interest, and for the marriage relation existing between the witness and the party, the husband would not be a competent witness in this case. We prefer, however, to place our decision upon the ground that the husband and wife are incompetent to testify for or against each other upon principles of public policy; and that incompetency applies, where the husband is called upon to testify as to his acts in the capacity of trustee for his wife. The law has never made any exception to the general incompetency of the husband to testify for the wife, because the subject of the testimony was his acts as trustee; and we do not think there is anything in our laws which demands the creation of a new rule. We decide, in this case, that the husband was incompetent to testify as a witness.

THE PEOPLE v. HENRY G. GREEN.

1 Denio (N. Y.) 614. (1845)

The prisoner was tried at the Rensselaer oyer and terminer, in July, 1845, before Parker, C., Judge, and others, for the murder of his wife by poisoning with arsenic. On the trial the district attorney, after laying a proper foundation, offered to give in evidence the dying declarations of the deceased as to the cause of death. The counsel for the prisoner objected, that the dying declarations could not be received ***where they came from the wife against the husband;*** but the court overruled the objection, and admitted the evidence. The prisoner having been convicted, the case was reported to the governor, who on the second day of September, during the last vacation, consulted his legal advisers in such cases. (See 2 R. S. 658, Paragraphs 13, 14.) The Chan-

cellor, the Chief Justice, and Mr. Justice Beardsley (Jewett, J., being absent,), were of opinion that the evidence was properly admitted; that the dying declarations of the wife may be received against the husband, on the same principle that she is allowed to testify against him where the complaint is violence against her person.

Mr. Justice Jewett, being afterwards consulted by his brethren, declared himself of the same opinion.

YOUNG, Admr. v. GILMAN.

46 N. H. 84. (1866)

This action was commenced by Augustus Burpee as administrator of Joshua F. Burpee, deceased. Augustus Burpee resigned his trust as administrator, and Young was appointed as administrator of the estate of said Joshua F. in March, 1866, and, at the commencement of the present term, notice was given upon the docket of the resignation of said Burpee, and said Young appeared as administrator as the plaintiff of record. Upon the trial, Augustus Burpee testified that the only object of the change of administrators was to enable him and his wife to testify in the cause and to exclude the defendant.

It did not appear that there were any claims against said estate, and it appeared that said Augustus Burpee and a sister of his who also testified without objection, were uncle and aunt to the deceased and heirs to his estate. It also appeared that said Burpee had furnished the means for carrying on this suit both before and after the appointment of Young, the estate having no assets except the claim in suit against this defendant. Said Burpee sat within the bar with the plaintiff's counsel a portion of the time during the trial.

After these facts had appeared the plaintiff offered the wife of the said Augustus Burpee as a witness to whom the defendant objected, but the court admitted her to testify and defendant excepted.

BELLOWS, J. The suit was in favor of an administrator of an estate in which the husband of the witness was interested as heir, it appearing also that there were no creditors. In case of a recovery, then, the husband would be entitled to a portion of the fruits of the judgment; he was, therefore, directly interested, for by that judgment he would be concluded.

Waiving, then, the question whether he should be regarded as a party,

one inquiry is whether the wife is a competent witness for or against the husband, where his interest is directly involved in the suit, and would be concluded by the judgment, but where he is not a party.

It must now be considered as well settled in New Hampshire, that the exclusion of the husband and wife as witnesses for or against each other, is founded as well upon reasons of public policy to preserve the sacredness of the marriage relation, as upon the identity of interests; and therefore that the removal by statute of the disqualification arising from interest, does not render competent the husband and wife. Kelly v. Proctor, 41 N. H. 139; Breed v. Gove, 41 N. H. 452; Smity v. Boston & Maine Railroad, 44 N. H. 325.

In all these cases, the husband was party to the suit. In Breed v. Gove, the wife living apart from the husband, was offered as a witness against him, to prove the delivery of necessaries to her while so living apart. In the others she was offered as a witness in his favor. In Smith v. The Boston & Maine Railroad, the suit was by the husband and wife for the loss of goods of the wife's before the marriage, and she was called to prove the loss. In all the cases she was held to be incompetent.

It is clear, therefore, that where the husband or wife is party to the suit, the other is not a competent witness, on grounds of public policy. Is the principle any the less applicable where the husband is not strictly a party to the suit, although his interest will be determined by it?

Mr. Greenleaf, in his work on Evidence, sec. 335, lays it down that the principle of the rule requires its application to all cases in which the interests of the other party are involved, and would be concluded by any verdict therein, though the husband or wife be not a party.

The same doctrine is laid down by Mr. Starkie in his work on Evidence, part 4, p. 708, and cases cited, although it is said that the interest must be vested and certain; but it is held that if the husband would be disqualified by reason of interest, the wife would be also; citing Tiley v. Cowling, 1 Ld. Raym. 744, which is in point.

So in 1 Phillips Evi. 64; and the same principle is recognized in Leggett & al. v. Boyd, 3 Wend. 376, where it was decided that the wife of the special bail was an incompetent witness for the defendant in the original suit.

These principles so laid down in the elementary books are well sustained by the authorities; and it is equally clear that they are not based upon the identity of interest alone, but upon reasons of public policy as well. In addition to the cases cited from our own reports to this point, are the authorities which show that the competency of the wife is not

restored by the termination of her interest; as, for instance the termination of the marriage relation by death of the husband, or by divorce, leaving the wife no interest in the estate. 1 Greenl. Evi. sec. 337, where it is said that the great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife.

In Steing v. Bowman, 13 Peters, U. S. Rep. 209, it was held that a wife, after her husband's death, could not be allowed to prove that her husband had confessed to her that he had committed perjury in a deposition read in the cause, although the husband was not a party or interested in the cause. A similar doctrine was applied where the wife had been divorced by act of Parliament. Monroe v. Twisleton, Evi. All. 87; recognized in Aveson v. Ld. Kinniard, 6 East. 192, 193. So, in Doker v. Hasler, Ryan & Moody 198, it was held that a widow cannot be asked to disclose conversations between her and her husband because of the violation of conjugal confidence. So in Starkie's Evi. part 4, p. 711, and cases cited. In O'Connor v. Marjoribanks, 4 M. & G. 435, it was held, that, in trover by the personal representatives of the deceased, his widow is not admissible to prove that she pledged the goods sued for to the defendant with her husband's authority; and this is put upon the ground of public policy, and it fully recognizes the doctrine of Monroe v. Twisleton, and the court holds that the disqualification is general, and not limited to confidential communications. See, also, 2 Kent's Com. 179, and notes and cases cited. So it is held, that, in a suit by the trustees touching her separate property, the husband could not be a witness for the trustees, although he had no interest in the subject. Burrel v. Bell, 2 Sandf. Ch. Rep. 15; Hasbrouck v. Vandervoost, 4 Sandf. 596, and 5 Seld. 153.

In N. H., it has been held, that, after the husband's death, if the wife have no interest in the suit, and the facts to which she is called to testify, did not come to her through any confidential communications of the husband, she may be a witness. Jackson & al. v. Barron, 37 N. H. 494. So in Pike v. Hayes, 14 N. H. 22, it is suggested by Gilchrist, J., that there is no reason why the wife, after the death of her husband, should not state facts which came to her knowledge from other sources, and not by reason of her situation as wife.

From those cases, it is fairly to be implied, even after the marriage relation is terminated, that the wife cannot disclose information which as a wife she had obtained during the marriage.

This review of the authorities shows that at common law the disability of the husband and wife to testify against each other still re-

mains, although the disqualification arising from interest be removed, as by a divorce, or by death; and it, therefore, would seem to follow logically that the removal of this disqualification by statute, as has been done here, would not make them competent witnesses.

Upon these views, we think the wife was not a competent witness, and there must be

A new trial.

COMMONWEALTH v. SAPP.

90 Ky. 580. (1890)

CHIEF JUSTICE HOLT. Upon the trial of William Sapp upon the charge of attempting to poison his wife, the state offered her as a witness against him, avowing by its attorney that it would prove by her she had seen the accused sprinkle a substance upon a piece of watermelon intended for her, and that the portion of it produced at the examining trial, and then shown to contain arsenic, was part of the piece prepared for her, and was when so produced, in the same condition as when she got it from him. It is claimed the attempt was made in August, 1888. Afterward, and before his trial, they were absolutely divorced. The court refused to permit her to testify, holding that she could not be a witness for any purpose; and whether this is so is the main question now presented.

It is a general rule of the common law, based both upon public policy and because of identity of interest, that neither a husband or wife can testify for or against the other; and some authorities hold that where this relation has once existed, the one is inadmissible for or against the other, even after the relation has ceased, as to any and all matters that occurred during its existence.

If the proposed testimony violates marital confidence in the slightest degree, or tends, however slightly, to impair the rule for its protection, the highest considerations forbid its introduction. The word "communication," therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or *vice versa,* but should be construed to embrace all knowledge upon the part of the one or other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. The reason of this rule

does not apply, however, to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates to the transactions of the one or the other; therefore, the rule should not be applied in such a case. What the State proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused. If she had not been then his wife, ordinary observation would have enabled her to know all that it was proposed to prove by her. But we think it was competent upon another ground. It was evidence relating to an alleged attempt at felony upon the wife. The rule that husband and wife cannot testify for or against each other is subject necessarily to some exceptions, one of which is, where the husband commits or attempts to commit a crime against the person of the wife. (Stein v. Bowman, &c., 13 Peters, 221.) It was never doubted but what she could exhibit articles of the peace against him. Roscoe says: "It is quite clear that a wife is a competent witness against her husband in respect of any charge which affects her liberty or person." (Roscoe's Criminal Evidence, page 150.)

In an English case, where the husband attempted to poison the wife with a cake into which arsenic had been introduced, and the wife was admitted to prove that her husband gave her the cake, it was held by the twelve judges that the evidence was rightly admitted. (Rex v. Jagger, Russ. Crimes, 632.)

The policy upon which the rule that the husband and wife cannot testify for or against each other is based is so far overcome as to create the exception by that superior policy which dictates the punishment of crime, and which, without the exception to the rule, would very likely go unpunished. It is of necessity. If it be said that our statute forbids the introduction of the husband or wife as a witness against the other, we reply, and so did the common law; and yet the exception named existed, and so it should, in our opinion, under our statute. The necessity of the case requires such a construction, and, as already said, the statute forbidding husband or wife to testify against each other is but declaratory of the common law.

This opinion is ordered to be certified to the lower court as the law of the case.

LISMAN, Admr. v. EARLY et al.

12 Calif. 282. (1859)

This was a bill to foreclose a mortgage upon a mining claim given to secure the payment of a promissory note. The action was on the note and mortgage.

The note and mortgage were given to one Michael Lisman, who since died, and the suit was brought by his administrator. On the trial, the plaintiff introduced as a witness one Hertch, who testified on his *voir dire,* that his wife was a sister and one of the heirs of the deceased. Defendants objected to this witness on the ground of interest. The court overruled the objection, and the witness was allowed to testify. The cause was tried by a jury, who returned a verdict for the plaintiff, and judgment was entered thereon. Defendants appealed to this court.

TERRY, C. J., delivered the opinion of the court; BALDWIN, J., concurring.

There is no doubt that the witness, Hertch, was incompetent on the ground of interest, and his testimony was improperly admitted.

It is urged by respondent, that this being an equity case, the court will not reverse because of the admission of improper evidence, but will proceed to examine and decide the case upon the legal evidence in the record. This is the ordinary and proper course in such cases, when the evidence in the record, excluding that improperly admitted is satisfactory, which is not the case here, as it is by no means clear that the judgment can be sustained by the record without the evidence of Hertch.

The judgment is reversed, and a new trial ordered.

SCHREFFLER v. CHASE.

245 Ill. 395. (1910)

MR. JUSTICE COOK delivered the opinion of the court:

Etta Schreffler and Ulysses Schreffler, her husband, the appellees, filed their bill of complaint in the Circuit Court of Kankakee county to contest the validity of the will of Rosella C. Paine, deceased, on the ground of mental incapacity. An issue at law was made up whether the writing produced was the will of the deceased or not. The first jury to whom this issue was submitted failed to agree and the issue was sub-

mitted to another jury, resulting in a verdict finding that the writing produced was not the will of Rosella C. Paine, and that she was not of sound mind and memory at the time of executing said writing. The court overruled appellants' motion for a new trial and entered a decree setting aside the probate of the will and declaring the purported will null and void. The defendants to the bill have prosecuted an appeal to this court.

The evidence offered by appellants, if considered alone would establish beyond question the validity of the will and the mental capacity of the testatrix.

Appellees called as a witness in their behalf Dickinson, the divorced husband of the testatrix, who, over the objection of appellants to his competency, was permitted to testify as to the conduct of his wife as observed by him from the time of his marriage to her up to the time of the separation.

It is obvious that the testimony of this witness must have been a material factor in the finding of the jury that the testatrix was not of sound mind and memory at the time of executing the will, and if such testimony was improperly admitted the decree based on such verdict cannot be permitted to stand. At common law a husband could not be a witness for or against his wife as to any matter, nor could he, either during the marriage or after its termination by death or divorce, be called as a witness to testify to communications between them, or to any fact or transaction the knowledge of which was obtained by means of the marriage relation.

In Griffeth v. Griffeth, 162 Ill. 368, a bill was filed by the wife for a divorce on the ground of the impotency of the husband. In holding that the evidence of the divorced wife was incompetent we said: "Whether the divorced wife's knowledge of her husband's conduct in the respect here referred to came to her as the result of his admissions to her or of her conversations with him, or as the result merely of her own observation, it was acquired in the confidence of the marriage relation, and therefore, her evidence in regard to it should have been excluded upon principles of public policy. The protecting seal of the law is placed upon all confidential communications between the husband and the wife, except so far as our statute has changed the rule. It makes no difference that the marriage relation no longer exists between them. 'Whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, even though the other party be no longer living.' (1 Greenleaf on Evidence, sec. 337.) Accordingly in Crose v. Rutledge,

81 Ill. 266, we said (p. 268): 'The defense offered the divorced wife of the plaintiff as a witness to prove a fact which must have come to her knowledge, from the very nature of the fact, during the existence of the marital relation. This testimony was properly excluded. Waddams v. Humphrey, 22 Ill. 661.'"

Dickinson necessarily obtained his knowledge of the facts about which he testified by reason of the marriage relation which existed between him and the testatrix, and he cannot be permitted to divulge these facts as evidence of the insanity or mental incapacity of his former wife.

The decree is reversed and the cause will be remanded to the Circuit Court for a new trial upon the issue at law whether the writing produced be the will of the testatrix or not.

Reversed and remanded.

CAMPBELL et al. v. CAMPBELL et al.

130 Ill. 466. (1889)

MR. CHIEF JUSTICE SHOPE delivered the opinion of the court:

This was a bill in chancery, by Ruth Campbell and others, heirs-at-law of Joshua Neely, deceased, to set aside his will, upon two grounds,—want of testamentary capacity of the deceased, and that undue influence had been practiced by Charles W. Enos and others, to induce the testator to execute the supposed will.

It is next assigned for error, that the court refused to allow contestants to examine, as witnesses, Rachel C. Williamson, Mary Sweeney and Genevieve Smith, who were all defendants to the bill, and had suffered the same to be taken as confessed as to them. It is said they were nieces of the testator and sisters of some of the complainants.

In Stewart Rapalje on Law of Witnesses, (page 293, sec. 171) it is said: "It is a well settled rule that the competency of one offered as a witness to testify in the case will be presumed, and the party objecting to his competency must state the grounds of his objections." And on page 299, (sec. 177) it is said: "The presumption being in favor of competency, the burden is upon the objector to prove that one offered as a witness is incompetent to testify, by reason of interest or otherwise. Thus to exclude a witness on the ground that his testimony, if admitted, will tend to protect him from claims against him, it must first be shown that there is at least a *prima facie* case of liability against him, and that

he is exposed to certain danger from such claims. The objector must point out to the court the ground of incompetency. The witness will not be excluded on the ground of interest if the question of his interest is in doubt." In section 174 of the same work it is said: "Objection to the competency of a witness having been made, the question of competency must be decided, no matter how difficult it may be to determine as to his interest or want of interest. To reject him in such a case, without deciding the question, is error, and to admit him is equally erroneous."

The law affords two modes of determining the interest of a witness in the result of a suit: First, by examining him on his *voir dire;* and second, by extrinsic evidence. The true test of the competency of these three witnesses is to be determined by ascertaining whether they would gain or lose by a decree setting aside the will. Being defendants, they were *prima facie* competent to testify on behalf of the contestants, and before excluding them, the court should have ascertained their real interest. It devolved upon the party objecting to show the court that their interest was with the party offering them as witnesses, if that fact did not otherwise appear. If they would not gain by having the will set aside, they were competent, otherwise they were not. The will, which was before the court, showed that they were devisees thereunder, and without further evidence on the subject, their evidence at least would appear to be adverse to the contestants and in favor of the proponents of the will. The fact, if conceded, that they were heirs-at-law of the testator, would not, of itself, establish their incompetency, or show that they would take a greater share as heirs than as devisees.

We think there was error in holding these witnesses incompetent to testify, without proof that their interest was with the contestants. In other words, the court should have ascertained their interest, and if they were called to testify against such interest, they should have been permitted to testify.

Decree reversed.

THE STATE v. CLARK.

60 Kan. 450. (1899)

JOHNSTON, J. E. C. Clark was charged with counseling, aiding and abetting in the murder of W. C. Boyd, and was found guilty of manslaughter in the second degree. The sentence imposed was imprisonment at hard labor for a term of five years, and the defendant appeals, alleging that several rulings of the court were erroneous and prejudicial.

It is strongly urged that error was committed in the admission of testimony of Harry Postlewaite. When he was offered as a witness in behalf of the state, an objection to his competency was made, and the preliminary inquiry disclosed that about two years before that time he had been convicted of grand larceny in Sedgwick county, and being then only about seventeen years of age he was sentenced to be taken to the state industrial reformatory and there confined until the managers or trustees thereof should declare that he was fully reformed. It was not shown that a pardon had been granted nor that the sentence had in any way been abrogated. No claim of that kind was made, but on the other hand the contention is that the conviction and sentence did not affect his civil rights, and that therefore no pardon was necessary. If the conviction and sentence rendered Postlewaite incompetent to testify, it would seem that a *prima facie* showing of incompetency was made when proof of the conviction and sentence was offered. While all witnesses tendered in court are presumed to be competent and credible, proof of a conviction and sentence for an infamous crime creates a presumption of incompetency, and it then devolves on the party offering the witness to overcome the presumption by showing that the conviction and sentence are without force. The question remains, however, whether a person between sixteen and twenty-five years of age who has been convicted of grand larceny and is adjudged to be taken to and confined at the reformatory loses his civil rights and is incompetent to testify.

At common law a person found and adjudged guilty of an infamous crime is deemed incompetent to testify as a witness in any court of justice unless the judgment of conviction has been reversed or a pardon granted. Our statute has modified the common law to the extent that in civil cases the conviction for a crime affects the credibility but not the competency of witnesses. It is provided that "no person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same as a party or otherwise, or by reason of his conviction of a crime, but such interest or conviction may

be shown for the purpose of affecting his credibility." (Gen. Stat. 1897, ch. 95, paragraph 330; Gen. Stat. 1889 4414.) See, also, Winter v. Sass, 19 Kan. 556. No like provision is to be found in criminal procedure, and the one with reference to the competency of witnesses does not except convicts from the common-law rule of disqualification. (Gen. Stat. 1897, ch. 102, Pg. 217; Gen. Stat. 1889, 5280.) It has, therefore, been held that "a person convicted of grand larceny and sentenced to imprisonment in the penitentiary is not a competent witness in a criminal case while the sentence remains unrevoked and such person not pardoned." (The State v. Howard, 19 Kan. 508.) As the witness Postlewaite was not sentenced to imprisonment in the penitentiary, the question remains whether he is disqualified as a witness.

It is conceded that if the convict has been rendered infamous he is incompetent to testify in a criminal proceeding. But what is it that renders him infamous? Is it the nature of the crime of which he is convicted or the character of the punishment inflicted? "Infamy" has been defined as a state of incompetency "implying such a dereliction of moral principle as carries with it a conclusion of a total disregard of the obligation of an oath." (1 Greenl. Ev., sec. 373.) At common law treason, felony, and such crimes as involve falsehood and were deemed to affect the administration of justice work the disqualification of a witness; and prior to the adoption of the federal constitution it was held that the infamy which disqualified a convict to be a witness depended upon the character of the crime and not upon the nature of the punishment. (Pendock v. McKinder, Willes, 665; Gilbert's Ev. 143; 2 Hawk., ch. 46, sec. 102.) The fifth amendment to the federal constitution, which provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, etc., has given rise to frequent definitions of the term "infamous crime."

In some of the earlier decisions there was a tendency on the part of the courts to hold that the question of infamy was to be determined by the nature of the crime and not at all by the character of the punishment, but the supreme court of the United States settled that the test to be applied in determining whether an offense is an infamous crime is the character of the punishment which may be inflicted. (Ex parte Wilson, 114 U. S. 426; 5 Sup. Ct. 935; Mackin v. The United States, 117 id. 352, 6 Sup. Ct. 777; In re Claasen, 140 id. 200, 11 Sup. Ct. 73; Ex parte McClusky, 40 Fed. 71; 10 A. & E. Encycl. of L. 603; 1 Bouv. Law Dict. 1026.) In Ex parte Wilson, supra, however, it was held that the real criterion to be applied in such cases is whether the crime is one

for which the statute authorizes the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. If the accused be in danger of being subjected to an infamous punishment the crime is deemed to be infamous, although infamous punishment may not be actually inflicted. If this rule be applied to the case under consideration, it results in the conclusion that Postlewaite was infamous and incompetent to testify. Grand larceny being a felony, is ordinarily punishable by confinement and hard labor in the penitentiary. All agree that punishment of this character renders the convict infamous and disqualifies him as a witness. The punishment in the present case was, as we have seen, confinement in the industrial reformatory, and the character of the punishment and discipline there is reformatory rather than ignominious or infamous; however, the convict was subject to the infliction of the severer punishment.

In People v. Park, 41 N. Y. 21, it was held that a person under sixteen years of age who was convicted of burglary in the third degree was incompetent to testify as a witness, although he was sentenced to the house of refuge established for the reformation of juvenile delinquents.

The view of this court is that the conviction and judgment rendered Postlewaite incompetent as a witness, and that, as it does not appear that the disability has since been removed by a pardon or a reversal, the testimony should not have been received. His was the most important testimony that was offered in the case, and not being competent, a majority of the court hold that substantial error was committed in admitting it.

In England, and in most of the states, statutes have been enacted, in one form or another, removing the disqualification of infamy, so that convicts may testify, but the conviction may usually be shown to affect the credibility of the witness.

The authorities cited consistently hold that whether a crime is infamous is determinable by the punishment to which a convict is subject, rather than the nature of the crime committed.

Under the general rule and apart from the statute, the test of infamy is the punishment which might be inflicted, but our statute modifies that and makes the punishment actually inflicted the criterion.

Imprisonment at hard labor has always been deemed infamous punishment, and under the statutes the civil rights of a convict are not lost except by a sentence actually imposing such punishment.

Judgment reversed and cause remanded for a new trial.

PRIVILEGED COMMUNICATIONS.[1]

HATTON v. ROBINSON.

31 Mass. 416. (1833)

Trespass for taking two mares, a chaise and chaise harness. The defendant pleaded the general issue, and filed a brief statement alleging that he attached them as the property of David Winch.

At the trial, before Wilde, J., it appeared that the plaintiff claimed the property under a bill of sale from Winch. The defendant, to prove the bill of sale fraudulent, offered in evidence the deposition of Samuel Ames Esq., a counsellor of law at Providence. The plaintiff objected to the admission of the deposition, on the ground that Mr. Ames was employed in the transaction testified to by him, as the attorney of Winch and the plaintiff, and that all he knew in relation to it was communicated to him in that capacity. The only evidence that Mr. Ames was so employed, was the deposition in question.

SHAW, C. J. The only question for the court in the present case, is, whether the deposition of Mr. Ames was properly admitted in evidence; and this depends upon the further question, whether the matters testified to by him, were to be considered as within the rule of privileged communications.

The rule upon which the plaintiff's counsel in the present case relied, to exclude all that part of the testimony of Mr. Ames, which consisted of statements made to him by Winch, as to his views and motives in making the sale, upon which the plaintiff founds his title, is that well known rule of evidence, founded on the confidence which a client reposes in his counsel, attorney or solicitor. By this rule it is well established, that all confidential communications between attorney and client, are not to be revealed at any period of time, nor in any action or proceeding between other persons; nor after the relation of attorney and client has ceased. This privilege is that of the client and not of the attorney, and never ceases, unless voluntarily waived by the client.

We had occasion lately to consider this subject in the case of Foster v. Hall, 12 Pick. 89, which was not published at the time this cause came before the court, in which it was decided, that the privilege was not confined to the case of communications made to an attorney, with a view to the prosecution or defence of a suit or legal process; but that it extends to all communications made to an attorney or counsellor, duly

[1] Hughes on Evidence, p. 286.

qualified and authorized as such, and applied to by the party in that capacity, with a view to obtain his advice and opinion in matters of law, in relation to his legal rights, duties and obligations, whether with a view to the prosecution or defense of a suit or other lawful object. This extent and modification of the rule, we thought, was well supported by the weight of authority, and consistent with the principle upon which the rule is founded. This principle we take to be this: that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it, that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence by requiring that on such facts the mouth of the attorney shall be forever sealed. To the rule as thus stated we are still inclined to adhere.

But the privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rules of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy, upon which it is allowed. It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other, as an interpreter, agent or attorney's clerk. And this privilege is confined to counsel, solicitors and attorneys, when applied to as such, and when acting in that capacity. Wilson v. Rastall, 4 T. R. 753.

But there are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the character of an attorney, does not render the communications attending it privileged; and they may be testified to by him, as by any other agent. In Wilson v. Rastall, already cited, Buller, J. says, that the privilege is confined to the case of counsel, solicitor and attorney, and it must be proved, that the information was communicated to the witness, in one of those characters; for if he be merely employed as steward, he may be examined.

So where the matter is communicated by the client to his attorney for purposes in no way connected with the object of the retainer and em-

ployment of the attorney as such. Cobden v. Kendrick, 4 T. R. 432. The court say, the difference is, whether the communications were made by the client to his attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum*.

And so strictly is the rule held, that the privilege extends only to communications made by the client to his attorney for the purpose of obtaining legal advice, that in a late case it was held, that a communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause. Bramwell v. Lucas, 2 Barn. & Cressw. 745.

Looking at the deposition of Mr. Ames, with these views in respect to the legal privilege of communications between attorney and client, it appears quite manifest, that the rule of exemption does not apply to any communication made by Hatton, the plaintiff, inasmuch as it does not appear that the witness was applied to by him, or that the relation of attorney and client, in any respect, subsisted between them. In regard to those communications, therefore, it appears to the court, that the witness cannot be exempted from testifying.

But upon examining the other part of Mr. Ames' deposition, we cannot perceive that the communications were made to him by Winch with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. If the disclosure of his views and purposes, in the conveyance of property proposed to be drawn, was not, as stated in some of the books, a mere *gratis dictum*, the only purpose seems to have been to satisfy Mr. Ames' mind, and remove any scruple that he might entertain, as to the character of the transaction, and to convince him, that whatever might be the legal character of the act, it was not attended with moral turpitude. It did satisfy him, that he was not engaged in a conspiracy to cheat, and induced him to consent to draw the deed. Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law, and none was given. We are therefore necessarily brought to the conclusion, that either these disclosures were made without any particular motive, or if there was purpose, connected with the proposed draft, it was to satisfy Mr. Ames' mind, upon a point of fact, not for the information of his own in point of law, and in either event they are not to be deemed privileged communications, which the witness was prohibited from disclosing. The whole deposition therefore was rightly admitted, and conformably to the case agreed, the nonsuit must stand.

GREENLAW v. KING.

1 Beav. 137. (1838)

LANGDALE, M. R. This is a bill, filed by the plaintiff against the defendant, to have it declared, that a security is void or satisfied. A motion is now made for the production of certain papers which by the answer, are admitted to be in the possession of the defendant.

As to some of the papers there is no dispute, viz., the documents in the first schedule, which, it is admitted, ought to be produced; and there is no doubt that certain documents in the second schedule, viz., the correspondence of the defendant and his agent with his counsel or solicitor ought to be protected; the dispute arises on other papers.

The production is resisted on the ground that the communications were confidential and ought to be protected. I am surprised at the extent of the protection from discovery which is sometimes claimed. The general rule of the Court is, no doubt, that what the Defendant knows relating to the matters in question, the Plaintiff has a right to know also, and for this very purpose, to prevent the Defendant from suppressing within his own breast the matters material to the determination of the question between the parties. A defendant may resist a just demand, knowing, from circumstances solely within his own knowledge, such resistance on his part to be unjust; this would be a fraud, and could only be prevented by a discovery. The Defendant, on the other hand, by filing a cross bill has a right to know all that the Plaintiff knows, and may be material for his defence; this is one of the great distinctions between courts of equity and the other courts in this country; here you can appeal to the conscience of the party, and obtain information; to extend the protection from discovery, further than is absolutely necessary, would be to cripple the jurisdiction of courts of equity in the most important particular. But there are exceptions to the general rule, and one is where knowledge of the fact has been communicated between the party and his solicitor; and it has been argued, that in every case in which a solicitor is bound to conceal his knowledge, the client himself ought to be protected from making such discovery. I do not accede to that proposition. There are many cases in which it would be contrary to the duty of a solicitor to disclose facts, of which, upon a bill being filed in this Court, the client would be bound to make a discovery; this shows that the two propositions are not co-extensive; the solicitor may not be bound, or not permitted to disclose matters which come to his knowledge as a solicitor, and yet the client may be

bound to disclose them. It is decided, that if the knowledge of the client be obtained through his solicitor, there may be a protection; but in this case it is apparent that the knowledge of the Defendant has not come to him through his solicitor. The argument is singular; it is said the information required to be disclosed was obtained from the late bishop, by *Leigh* in his character of solicitor; and that it was therefore his duty not to communicate it; that it must have been from Leigh that the Defendant acquired the information; and that the Defendant was entitled to the same privilege as *Leigh* and was not, therefore, bound to state the information, because Leigh would not have been at liberty to disclose it as against the late bishop. It is very difficult to follow this. The bishop's executors, it is true, are not here; but, for any thing that appears to the contrary, the Defendant has obtained the information from the bishop himself. If Leigh performed his duty, which I must assume he did, he would not have delivered up the papers without the consent of the bishop or his executor; and as these papers do not appear to have passed between the Defendant and his solicitor, and are, therefore, not within the exception, they must be produced.

I take it to be clear, that the other documents which are the subject of discussion, consisting of the correspondence which has taken place since the dispute arose, between the Defendant and the solicitor to the late bishop, but who is not the solicitor of the Defendant, being merely his agent and confidential friend, are not protected. If these letters had been written to Leigh for the purpose of being communicated, by that channel, to counsel, another question might have arisen; I might have thought it subject to a different rule, but it is not so; they are communications which have taken place between the Defendant and Leigh, not in his character of solicitor; and it cannot be said, that a mere friend is a person so confidential that a communication with him is privileged; the cases of privilege are confined to solicitors and their clients; and stewards, parents, medical attendants, clergymen and persons in the most closely confidential relation are bound to disclose communications made to them. How can it be said that a mere friend is not equally bound? There must be a production of the papers and the correspondence which passed between bishop and Leigh in the lifetime of the bishop; and of those papers between the Defendant and Leigh, acting as his agent and not as his solicitor.

The production of the opinion of counsel was not required, and all the other papers, except the correspondence between the Defendant and his solicitor, were ordered to be produced.

PHILLIPS v. CHASE.

201 Mass. 444. (1909)

Petition filed in the Probate Court for the county of Essex on October 14, 1905, by Leonard H. Phillips and others, as the heirs and next of kin of Jeannie P. Chase, late of Swampscott, who died on September 13, 1905, praying that a decree of that court entered on April 23, 1889, whereby DeForest Woodruff Chase was made the child by adoption of Jeannie P. Chase, be revoked on the ground that it was procured by the undue influence, threats and duress of Horace Chase, the husband of Jeannie P. Chase, and was a fraud upon the court.

In the Probate Court, Harmon, J. made a decree revoking the former decree of adoption on the ground of undue influence. Horace Chase, as the sole heir at law of DeForest Woodruff Chase, who had died after the filing of the petition, appealed. He also appealed as the administrator of the estate of DeForest Woodruff Chase. On appeal the case was tried before Braley, J., who submitted to a jury the following issues:

"Did Jeannie P. Chase of her own free will adopt DeForest Woodruff Chase on April 23, 1889?"

"Was she unduly influenced in the making of said adoption by Horace Chase or any other person?"

Upon the first issue the jury answered "No," and upon the second issue answered "Yes." Horace Chase, the respondent and appellant, alleged exceptions relating to the admission of evidence against his objection, raising the questions which are discussed and disposed of in the opinion.

KNOWLTON, C. J. This is a petition for a revocation of a decree of the Probate Court for the adoption of DeForest Woodruff Chase by Jeannie P. Chase, then the wife of Dr. Horace Chase.

An interesting question is raised by the respondent on the admission of the testimony of Mr. Chick, at one time an attorney of Mrs. Chase, in regard to an affidavit and will made by him for her, and certain communications, relative to the adoption, to be made by him to her brothers on her behalf after her death. He testified, among other things, that she told him to "tell her brothers that this adoption was not her own free act and deed, that it was brought about by ill treatment and coercion, duress on the part of her husband, and that she did not want it to stand." He prepared an affidavit for her which she signed and swore to before a notary, and a will in which she said, "I now declare that said

adoption was not made by me of my free will and choice but was forced upon me by my husband by threats of abandonment and I believe it was so forced upon me in order that said DeForest W. Chase might claim as my heir the residue under a certain trust settlement," etc. The statement in the affidavit was in the same substance as that in the will. It is the contention of the respondent that this evidence should have been excluded as a private communication from a client to an attorney.

It has been repeatedly held that this rule of privilege should be construed strictly. Foster v. Hall, 12 Pick. 89, 98. Hatton v. Robinson, 14 Pick. 416, 422. It is for the protection and benefit of the client, so that his disclosures may not be used against him in controversy after his death between his estate and those claiming adversely to it, the privilege may be waived by his executor or administrator, (Brooks v. Holden, 175 Mass. 137) or by his heirs (Fossler v. Schriber, 38 Ill. 172); but where the controversy is not between an estate and persons claiming against it, but is to determine who shall take by succession the property of a deceased person, and both parties claim under him, the reason for the privilege does not exist, and neither can set up a claim of privilege against the other. Doherty v. O'Callaghan, 157 Mass. 90; Russell v. Jackson, 9 Hare, 387; Blackburn v. Crawfords, 3 Wall. 175, 192, 194; Glover v. Patten, 165 U. S. 394, 406. See, also, as tending to establish the same proposition, Layman's Will, 40 Minn. 371; Coates v. Semper, 82 Minn. 460; Kern v. Kern, 154 Ind. 29; O'Brien v. Spalding, 102 Ga. 490; Scott v. Harris, 113 Ill. 447, 454; Thompson v. Ish, 99 Mo. 160, 175.

There was also a special reason for the admission of this evidence, because there was an implied waiver of a privilege of Mrs. Chase in her request that the fact should be communicated to her brothers after her death. Scott v. Harris, 113 Ill. 447; Bruce v. Osgood, 113 Ind. 360; Ferguson v. McBean, 91 Cal. 63, 73; Blackburn v. Crawfords, 3 Wall. 175, 194; Winters v. Winters, 102 Iowa, 53, 57, 59. This evidence was rightly admitted.

Exceptions overruled.

MATTER OF KING v. ASHLEY.

179 N. Y. 281. (1904)

PER CURIAM. This was a proceeding instituted under sections 2707 and 2709 of the Code of Civil Procedure for the examination of the appellant to obtain a discovery of his information concerning property belonging to the estate of William Moore, deceased. The appellant attended in answer to a citation, but declined to answer certain questions put to him on the ground that by section 835 of the Code of Civil Procedure, he was forbidden to disclose the information sought, having been the attorney and counsel of the deceased. The sole object for which the proceeding was instituted was to obtain the disclosure of information. We think that the order punishing the witness for failure to answer is the final order in the proceeding, and, therefore, appealable to this court. (People ex rel. Grant v. Warner, 51 Hun, 53; affirmed on opinion below, 125 N. Y. 746; Matter of Strong v. Randall, 177 N. Y. 400.)

On the merits we think the order should be affirmed. It is not necessary to consider whether, by the execution and publication of a will disposing of his interest in the estate of William Van Rensselaer, the testator withdrew any communications he may have made to the witness, as to the identity and location of that estate, from the seal of confidence and the protection of section 857 of the Code, specifically set forth in the order adjudging the appellant guilty of contempt. These questions do not call for communications from the deceased to the appellant, but for information which he had obtained from other sources as appears by his own testimony. It was settled in the cases which arose before the enactment of the Code provisions on the subject that the privilege of the attorney (or rather that of the client, for it is such) does not extend to everything which comes to his knowledge while acting as attorney or counsel, and does not include information derived from other persons or other sources. (Crisby v. Berger, 11 Paige, 377; Bogert v. Bogert, 2 Edw. Ch. 399; Coveney v. Tannahill, 1 Hill, 33.) The section of the Code is a mere re-enactment of the common law rule (Hurlburt v. Hurlburt, 128 N. Y. 420). The appellant was, therefore, properly required to give all his knowledge or information on the subject that did not involve communications with the deceased.

The order appealed from should be affirmed with costs.

CULLEN, Ch. J., O'BRIEN, MARTIN, VANN, and WERNER, J., concur; GRAY and HAIGHT, JJ., absent.

Order affirmed.

STATE v. WHITE.

19 Kan. 445. (1877)

HORTON, C. J. The defendant White was charged on information with the offense of bigamy. The first jury impanelled to try the cause could not agree, and were discharged without finding a verdict; and another jury, before which the cause was tried at the same term, rendered a verdict of guilty. Thereupon the defendant was sentenced to the penitentiary for the term of three years, and he now appeals to this court.

The serious error alleged is, the action of the court in compelling the defendant to disclose communications between himself and his attorney. Evidence having been admitted concerning a divorce having been granted between the prisoner and his first wife, in the State of New York, prior to the second marriage, the defendant, testifying in his own behalf was required by the court to answer, on cross-examination, "if he had not been consulted, or advised by his counsel in regard to obtaining a copy of such decree." Objection was duly made to the question on the ground that the communications between counsel and client were privileged; that the court overruled the objection, and in so doing committed material error. The defendant in fully answering the question gave the advice of one of his lawyers to him. The statute provides that an attorney shall be incompetent to testify concerning communications made to him by his client in that relation, or his advice thereon, without the client's consent. This statute would be of no utility or benefit, if the client could be compelled against his consent, to make such disclosures. It would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client. In such an event, in all civil actions, the confidential statements of client and counsel would be exposed, and likewise the same would occur in all criminal actions where the defendant should testify. The authorities are otherwise. The true views seem to be, that communications which the lawyer is precluded from disclosing, the client cannot be compelled to disclose. This privilege is essential to public justice, for did it not exist no man would dare to consult a professional adviser, with a view to his defense, or to the enforcement of his rights. Whar. on Ev. sec. 583; Hemenway v. Smith, 28 Vt. 701 Carnes v. Platt, 15 Abb. Pr. (N. S.) 337; Merritt v. Morgan, 21 Wend. 467; Williams v. Fitch, 18 N. Y. 546-550; Britton v.

Lorenz, 45 N. Y. 51-59; Bigler v. Regher, 43 Ind. 112; 1 Greenl. on Ev. secs. 236-240. It is urged against a reversal of the judgment, that the question might have been answered by "yes" or "no", and that the advice or conversation testified to was not very material, and could not have been prejudicial to the rights of the defendant. We answer that the District Court violated a very important rule of evidence, and forced the disclosure of privileged communications in a criminal case where the liberty of the defendant was at stake; and we will not stop to weigh the effect of the answer, or determine how far the rights of the prisoner were sacrificed. It is very important to public interests that the purpose of the statute as to such communications should be maintained in all its rigor. It is the best rule. *Obsta principiis.* If a client sees fit to be a witness, he makes himself liable to a full cross-examination. But in this case the defendant did not, in his direct examination, refer to his counsel, or any conversation with, or advice from them; and the question was inexcusable.

For the error committed in the action of the court in compelling the disclosure of the communications between the defendant and his attorney, the judgment is reversed, and the action remanded for a new trial.

All the Justices concurring.

NAVE v. BAIRD.

NAVE v. LANE et al.

12 Ind. 318. (1859)

PERKINS, J. Baird sued Nave upon a promissory note for 200 dollars.

Answer by way of counter-claim, alleging that the note was given in consideration that said Baird, an attorney at law, should attend to a certain cause then pending against said Nave in the Fountain Circuit Court; that Baird did not, in a skillful manner, conduct the defense of the cause and refused to obey the instructions of his client in these particulars, viz.: that he refused to apply for a change of venue therein, and refused to put in the testimony of certain witnesses. It is further alleged that judgment went against Nave, whereby he

was damaged 3,000 dollars, which amount, he claims, should be adjudged in his favor against Baird.

A jury was called to try the issue made. Verdict for the plaintiff, upon which the court rendered judgment.

There is another point in the case. Associated with Mr. Baird, in the defense, were Messrs Lane and Willson of Crawfordsville. They were present at the consultations between Mr. Nave and Mr. Baird, and on the trial of this cause, to rebut testimony introduced by Mr. Nave, as to what transpired in those consultations, offered Mr. Willson as a witness. Mr. Nave objected to his testifying, on the ground that he was not competent to disclose confidential communications.

As a general proposition, an attorney cannot, as a witness against his client, disclose such communications. But the rule does not apply where the client sues the attorney for disobeying instructions alleged to have been given in such consultations, and for unskillfully managing a cause upon information given to him by his client in them.

Upon the whole we see no error in the case.

Per Curiam.—The judgment is affirmed with 5% damages and costs.

LANE v. BOICOURT.

128 Ind. 420. (1891)

Appellee sued appellant, a physician, for malpractice in the performance of an operation upon appellee's wife. Judgment for plaintiff. Motion for new trial overruled. Defendant appeals.

ELLIOTT, J. * * * We come now to a question presented by the ruling denying a new trial. The appellee, his wife, and his wife's mother, testified as to all that was done by the appellant at the time the surgical operation which caused the injury to the appellee's wife was performed. The appellant also testified, without objection, to what occurred at that time. He then called Dr. Williamson, who was in attendance as a consulting surgeon, but the trial court refused to permit him to testify to any matter that occurred at the time the operation was performed by the appellant. In our judgment this was error.

The testimony given by the witnesses of the appellee broke the seal of privacy and gave publicity to the whole matter. The patient

waived the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to apply to such a case as this, nor is it within the letter or the spirit of the law. If a patient makes public in a court of justice the occurrences of the sick room for the purpose of obtaining a judgment for damages against his physician, he can not shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he can not be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician, or is the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction it is fully opened to investigation, if opened at all, by the party having a right to keep it closed. A patient can not elect what witnesses shall be heard and what shall not; for if once investigation legitimately begins, it continues to the end. A patient may enforce secrecy if he chooses, but where he himself removes the obligation he can not avail himself of the secrets of the sick room, or of the consultation, we may say in conclusion, that the physician is forbidden to reveal, and what is made public by pleadings and by evidence in a court of justice can by no possibility be privileged to benefit the party who has given it such wide publicity.

Judgment reversed.

In re REVOCATION OF PROBATE of the WILL of MARY A. MYER, Deceased.

184 N. Y. 54. (1906)

Appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 11, 1905, which affirmed a decree of the Seneca County Surrogate's Court re-

voking probate of the will of Mary A. Myer, deceased.

This proceeding was instituted in the Surrogate's Court of Seneca county to procure the revocation of the probate of the will of Mary A. Myer, deceased, upon allegations that at the time of the execution thereof she was not mentally capable of making a will and that its execution was procured by the undue influence of her son, William H. Myer. The petitioners are Mary L. C. King, the only daughter of testatrix, and John V. Myer, her youngest son.

WERNER, J. The unanimous affirmance by the court below precludes the examination in this court of any of the questions raised by the appellants, save those arising upon exceptions taken to the rulings of the surrogate upon the admission or rejection of evidence. Some of the exceptions thus taken present errors which require a reversal of the order appealed from, because it appears that the exceptions were clearly prejudiced by such rulings. (Code Civ. Pro. 2545.)

The petitioners introduced testimony tending to show that, at the time of the execution of the will, the testatrix was afflicted with paresis, which it was claimed deprived her of testamentary capacity. In order to supplement and support this evidence, the petitioners called two physicians, Drs. Carlton and Townsend. The former had been the medical adviser of the testatrix's brother, and the latter of her mother. These witnesses testified that both the mother and brother of the testatrix had been afflicted with what they termed "general paresis;" that their knowledge of this condition was obtained while attending such persons in their professional capacity, and that such knowledge was necessary in order to treat them. The testimony was objected to as incompetent and privileged under section 834 of the Code of Civil Procedure, and the ruling admitting it was properly excepted to because it was inadmissible on two grounds. 1. It is clearly within the provisions of section 834, which prohibits a physician from disclosing "any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." (Renihan v. Dennin, 103 N. Y. 573; Feeney v. Long Island R. R. Co., 116 id. 375; Fisher v. Fisher, 129 id. 654; Nelson v. Village of Oneida, 156 id. 219; Meyer v. Knights of Pythias, 178 id. 63.)

By the express terms of section 836 the provisions of section 834 are made to apply to the "examination of *any* person as a witness." The fact that the testimony of these physicians related to patients, who were not parties to the proceedings or interested therein, and

who were in fact dead at that time, does not annul the prohibition of the statute. In Davis v. Supreme Lodge (165 N. Y. 159) the defense sought to prove the cause of death of two aunts of the deceased by the testimony of their attending physicians. The evidence was excluded, and this court upheld the ruling. Judge O'Brien, in writing for the court, said (p. 163): "This court has held that the statements of the attending physician, for the purpose of establishing the cause of death either of the insured himself or of his ancestors or their descendants, although not parties to nor beneficiaries under the contract, were not admissible. They are excluded not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between the physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it." (Grattan v. Met. Life Ins. Co., 80 N. Y. 281; Westover v. Ætna Life Ins. Co., 99 id. 56; Nelson v. Village of Oneida, 156 id. 219. The general rule of exclusion provided for in section 834 is not obviated in this case by the exceptions thereto contained in section 846, because the testimony objected to does not fall within either of these exceptions.

The decree of the surrogate and the order of the Appellate Division should be reversed and a new trial ordered before a jury in the Supreme Court, costs to abide the event.

ROSE v. ORDER OF PATRICIANS.

126 Mich. 577. (1901)

Assumpsit, by Thomas Rose against the Supreme Court of the Order of Patricians on a benefit certificate. From a judgment for plaintiff, defendant brings error. Affirmed.

The defendant is a fraternal beneficiary order, incorporated under the laws of Michigan. Plaintiff's wife became a member of the order August 18, 1898, and passed the usual medical examination. She died November 18th following. Plaintiff was her beneficiary. Her certificate was for $1,000. In her application she stated that she was 45 years of age; was in good health; had never consulted a

physician; never had a serious illness; no disease of heart, stomach, or bowels; no irregularity of the heart's action; no loss of consciousness; no palpitation of the heart. This application further stated that the answers and statements are correct, and shall form the basis for the issuance of a benefit certificate, and that the certificate issued thereon and the answers and statements shall be considered together, and construed as one complete contract.

GRANT, J. A physician who had been employed by the deceased was called as a witness by the defendant, had testified to his attendance upon her, and he was then asked:

"Excluding any knowledge or information you obtained while treating the insured, and judging from her appearance at the time of the treatment, what is your opinion whether she was a woman in good health and sound body, and a woman who usually enjoyed good health?"

The refusal of the court to permit an answer to this question is alleged as error. It was excluded under section 10181, 3 Comp. Laws 1897. Counsel rely upon Edington v. Ins. Co., 77 N. Y. 564, where the question was asked:

"Excluding any knowledge or information that you obtained while treating the deceased, and judging from his appearance from that time until 1867, what is your opinion as to whether he was a man in good health?"

The difference between the two cases is apparent. In the New York case, any information or knowledge of his appearance while the physician treated him was not asked for. The physician had seen him many times after his employment had ceased, and his appearance upon which his opinion was based was expressly limited to that period. In the present case the witness was asked to give an opinion based upon her appearance at the time of the treatment. This was excluded by the statute.

Judgment affirmed.

The other Justices concurred.

ALFORD v. JOHNSON.

103 Ark. 236. (1912)

FRAUENTHAL, J. This is an appeal from a judgment declaring invalid the alleged last will and testament of one W. S. Stroope. The contestants are the heirs at law of the testator, and the proponent of the will and chief beneficiary therein is Lorinda Alford, who claims to have been his housekeeper, but who, the contestants claim was his mistress. The contestants sought to invalidate the will upon the grounds (1) that the testator did not possess sufficient mental capacity at the time of its execution, and (2) because it was obtained by the fraud and undue influence of said Lorinda Alfor. The trial resulted in a verdict against the will. The proponent now seeks a reversal of the judgment upon the ground that the court erred in admitting certain testimony, and because the evidence adduced upon the trial of the case is insufficient to warrant the verdict which was returned.

During the progress of the trial, the contestants introduced as a witness one D. D. Warlick, who is a minister of the gospel of the Methodist Church. This witness testified that during 1907 he had conversations with the testator in which he spoke of his past life and of his adulterations with said Lorinda Alford, and of her great influence over him. He also testified that Stroope was not a member of his church or of any church; that on one of these occasions he spoke penitently of his conduct and of a desire to join his church. The witness told him, however, that he could not do this as long as he lived in these wrongful relations with a woman not his wife. He testified to other statements made by Stroope to him of his relations with and the influence exercised by Lorinda Alford over him. The appellant objected to the introduction of this testimony, upon the ground that these communications were privileged. Her objection was overruled, and exception was properly saved to the ruling of the court.

It is contended that this testimony was inadmissible by reason of section 3097 of Kirby's Digest, which provides: "No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character in the course of discipline enjoined by the rules or practice of such denomination." The communications that are made privileged by this statute are those which are made in the course of discipline

by reason of the rules of the religious denomination. If the communications are made to one who happens to be a clergyman, but who does not sustain to the communicant that professional character or relation, they are not privileged. Before the statements or confessions made to a minister of the gospel or priest of any denomination can be held to be inadmissible, it must appear from the evidence that they were made to such minister or priest in his professional character, and because enjoined by the rules or discipline or practice of such religious denomination. As is said in Wharton on the Law of Evidence, sec. 597: "Under these statutes, however, a communication to be privileged must be made by a penitent as an enjoined religious discipline, to a priest, and does not cover a confession made to a clerygman not in the course of such discipline." See also Wigmore on Evidence, sec. 2693; Knight v. Lee, 80 Ind. 201; State v. Morgan (Mo.) 95 S. W. 402.

It does not appear from the testimony adduced in this case that the statements made by Stroope to Warlick were made to him in any professional relation to Stroope as a clergyman, nor was there any testimony that such statements were made in the course of discipline enjoined by any rules or practice of the religious denomination of which Warlick was a member. These communications were made to Warlick in like manner as to any individual; and while it is true that Stroope also spoke to him relative to his desire to become a member of his church, the communications were not made to Warlick in his professional character or by reason of any rule or practice of that church. It follows that the testimony given by this witness was not inadmissible by reason of the above statute; and appellant did not object to the admissibility of this testimony upon any other ground.

Judgment affirmed.

REUTKEMIER v. NOLTE.

179 Iowa 342. (1917)

Action for damages, actual and exemplary, by the plaintiff against the defendant for the alleged debauching of his minor daughter. Actual damages for expenses and loss of service are claimed under the provisions of Code Section 3471. The defense was a general

denial. There was a verdict for the plaintiff for $6,500, and the defendant appeals.

Affirmed.

EVANS, J. The facts as contended by plaintiff, briefly stated, are that in September, 1912, the defendant, a man then 21 years of age had carnal knowledge of the plaintiff's daughter, Mary, then a child only 14 years of age. In June, 1913, she gave birth to a child, alleged to be the result of such intercourse. The plaintiff was, at the time, a farmer living upon his own farm. He was a widower, with three daughters and three sons, all living with him at his home. The evidence on behalf of the plaintiff was quite abundant to sustain the verdict. The appeal is presented here on assignments of error assailing certain rulings in the admission of testimony and certain instructions of the court.

1. The most important and doubtful question raised relates to an alleged privileged communication, the claim of privilege being based upon Code Section 4608. Plaintiff's daughter was a member of the Presbyterian church. In the month of March before her child was born, she was asked to appear and did appear before the church session. Such session consisted of the pastor and the three ruling elders. She appears to have confessed her sin, and to have made certain communications to the elders. On the trial of this case, the defendant sought to show what such communication was. It is claimed for the defendant that such communication involved others, as well as himself, and that at least it cast much uncertainty upon the paternity of the child. The plaintiff objected to such line of testimony, both on the ground that it was not binding upon him as substantive testimony, and that, in any event, it was a privileged communication under the provisions of the statute. The first objection was clearly good as far as it went. The defendant, however, sought to lay a foundation in the cross-examination of the daughter Mary as a witness for her impeachment, by calling her attention to such alleged communication. Of course, if the communication was not privileged, it was competent, even as against the plaintiff, to offer the same for the purpose of impeachment. On the other hand, if the communication was privileged, it was no more available to the defendant for impeachment purposes than for any other purpose. If it was privileged, then, under the view of the trial court, it would be equally improper to lay a pretended foundation for its introduction as impeaching testimony. The question, therefore, was precipitated in the cross-examination of the witness Mary. The trial court exer-

cised its discretion to stop temporarily the cross-examination, and to permit the parties in the absence of the jury, to introduce evidence of such facts as were material to be considered, to enable the court to determine whether the communication in question was privileged. It is not free from doubt, upon the record before us, whether the cross-examination of the witness at this point was justified by the state of her testimony at the time. In view of the fact, however, that the attention of both court and counsel appears to have been concentrated upon the question of privilege, as decisive of that line of examination, we are disposed to meet that question as the one of larger merit. Code Section 4608 is as follows:

"No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred."

In applying this section to the case before us, two questions naturally arise:

1. Was the communication a confidential one?

2. Were the recipients of such communication ministers of the Gospel within the meaning of the statute?

As to the first question it is apparent the communication was of such a nature as would usually and naturally be deemed confidential if for no other reason than that it involved a confession of sin to a spiritual adviser. We feel no hesitancy in holding the affirmative on this question. The second question presents greater difficulty. What is a "minister of the Gospel," within the meaning of this statute? The law as such sets up no standard or criterion. That question is left wholly to the recognition of the "denomination." The word "minister," which, in its original sense, meant a mere servant, has grown in many directions, and into much dignity. Few English words have a more varied meaning. In the religious world, it is often, if not generally, used as referring to a pastor of the church and a preacher of the Gospel. This meaning, however, is not applicable to all Christian denominations. Some of them have no pastors and recognize no one as a minister in that sense, and yet all denominations

recognize the spiritual authority of the church, and provide a source of spiritual advice and discipline. The record herein contains a copy of the "Confession of Faith" of the Presbyterian church, as well as other standard booklets setting forth the doctrine and polity of that denomination. (Excerpts therefrom follow).

To the foregoing, it may be added that the office of ruling elder is perpetual, and no person can be divested of it except by removal. These ruling elders have nothing to do with the temporal affairs of the church, but deal wholly with its spiritual side and its discipline. It will be noted also, from what we have quoted, that, although it is required that the pastor of the congregation shall always be the moderator of the session, when there is a pastor, yet, if there be no pastor, and it be impracticable to obtain another pastor, the ruling elders are authorized to conduct the session without one. It will be noted also that there is no power of discipline conferred upon the pastor except in conjunction with the ruling elders.

Turning now to the statute itself, the fact that it lays its inhibition upon stenographers and confidential clerks "of any person who obtains such information by reason of his employment," indicates a rather broad scope of the statute, and indicates the legislative intent that the privileged communication should be protected also against divulgence by those persons, whose duty and relation to the chief recipient were such as to enable them to know the communication. The privilege of the statute purports to be applicable to every Christian denomination, of whatever polity. Under the polity of the Presbyterian denomination, this privilege cannot be applicable to it unless it be true that the ruling elders are "ministers of the Gospel," within the meaning of the statute. We find they are such within the contemplation of the Presbyterian Confession of Faith, and therefore they are such within the meaning of the statute. We hold that the trial court ruled correctly at this point.

COOK et al. v. CASTNER et al.

JORDAN et al. v. FARREN et al.

63 Mass. 266. (1852)

These were two cross-examinations between the same parties, and arising out of the same transaction.

The first was an action of assumpsit with the money counts to recover back the purchase-money of the barque Averon, sold by the defendants to the plaintiffs.

At the sale there was no warranty, but the sale was made under representations as to the condition of the timbers and fastenings of the vessel. After the sale, the plaintiffs had the vessel examined, when they found some of the timbers unsound; they attempted to repair these, and, in doing so, made further discoveries as to the condition of the timbers and fastenings, and immediately offered to return the vessel to the defendants.

At the trial, in the court of common pleas, the plaintiffs introduced evidence that, with the defendants' knowledge, they bought on the faith of these representations; that the representations were materially false, and were known to be so by the defendants at the time they were made.

The jury found a verdict for the defendants, and the plaintiffs moved for a new trial, for the following reasons, to wit:

1st. Because Mr. Ballard, one of the jurors by whom the verdict therein was rendered, had, prior to the time of the trial, examined the barque Averon, the subject of that suit, about the time of her abandonment by the defendants, and had then formed an opinion of the condition of the vessel at the time of her sale to the defendants, and was not an unprejudiced and unbiased juror, and was thereby rendered incompetent as a juror in the cause.

2nd. Because Ballard, after the cause was committed to the jury, and before the verdict, stated to his fellow-jurors, not in the presence of the judge, and not as a witness under oath that he had "examined the vessel and knew all about her; that she was more rotten than she was proved to be at the trial, and that she was rotten throughout; that he would bet five hundred dollars that, if she were opened now, it would be found that she was rotten in places where one of the plaintiffs' deponents said he had found her sound when he repaired her; for he, Ballard, saw rot in those places when he looked at her."

All which matters and things were unknown to the plaintiffs until after the verdict was rendered; whereby the plaintiffs were prejudiced, and suffered manifest wrong and injury by the improper conduct of the juror. And the plaintiffs prayed that the verdict in the cause might be set aside, and a new trial ordered.

On the hearing of this motion, the plaintiffs offered to prove, by Ballard and by the foreman of the jury, the truth of the facts stated in the motion for a new trial, in respect of Ballard; but the presiding judge ruled that the testimony of these witnesses could not be received; that the jurors were not competent witnesses to prove the facts stated in the plaintiffs' motion for a new trial, it appearing that the plaintiffs proposed proving that these directions were made while the jury were together, deliberating upon the verdict they should render.

To this ruling the plaintiffs excepted.

SHAW, C. J. These two cases, as we understand, are cross actions between the same parties, although the names and titles of the causes are different, being controversies arising out of the same transaction, the purchase and sale of a vessel, called the barque Averon, in which Castner and Jordan were the vendors, and Cook and Farren the purchasers. They were both tried together, and went to the same jury, and verdicts in both were rendered at the same time.

As to the juror, the offer of the plaintiffs was only to show what took place in the jury-room at the time the jury were in deliberation on their verdict. It was, that the juror stated that he had examined the vessel before the trial, that he was of opinion that she was very rotten, and so stated to the rest of the jury.

We think the judge was right in rejecting evidence of the alleged partiality and misconduct of a juror in the jury-room, by the testimony of the juror himself, or of the other jurors. It is a rule, founded upon obvious considerations of public policy, and it is important that it should be adhered to and not broken in upon to afford relief in supposed hard cases.

A verdict, as the name imports (*veredictum*) is taken, in theory of law, to be absolute truth, and it is important that it be so regarded. All communications among the jurors are confidential; they are intended to be secret, and it is best they should remain so. It is very probable, indeed it is almost inevitable, that many things should be said and views expressed, by individual jurors, which not only have

no influence on others, but which they themselves do not ultimately adhere to and act upon.

Judgment in each case on the verdict for the defendants.

WILKERSON v. STATE.

91 Ga. 729; S. E. 990. (1893)

Wilkerson was indicted for murder, and was found guilty of voluntary manslaughter. His motion for a new trial was overruled, and he excepted.

LUMPKIN, Justice. On the trial, the accused offered in evidence, and also offered to read as a part of his statement, a letter which had been written by Stephens to his wife, and which she had voluntarily delivered to Wilkerson some time before the homicide. This letter contained intimations that the writer knew of the relations existing between his wife and Wilkerson, and also a threat against the latter. The court rightly rejected the letter, and refused to allow it to be read to the jury. Section 3797 of the Code declared that communications between husband and wife are, from public policy, excluded as evidence. Mrs. Stephens would not, for this reason, have been permitted, as a witness upon the stand, to testify to communications from her husband to herself; or to read to the jury a letter which he had written to her. We are therefore decidedly of the opinion that the same result cannot be indirectly accomplished by her voluntarily delivering a letter of this kind to another person. We are aware that there are respectable authorities holding that a privileged oral communication may be given in evidence by one who overheard it, though an eavesdropper; or that a privileged written communication, purloined from the proper custodian of it, may be received in evidence. In such instances, however, the parties to the privileged communication do not themselves successfully make and keep it private; but where this result is accomplished, the law will not permit either of the parties, directly or indirectly, to violate the confidence of the other. In respect to documents, there is a difference between those which are confidential in their own nature, such as letters between husband and wife and those which become confidential by custody, such as papers deposited by a client with his attorney. The law, for reasons of its own, desires that all communications between husband

and wife shall be absolutely free and untrammeled, and that each may say or write whatsoever he or she pleases to the other, with the absolute assurance that the one receiving the communication will neither be compelled nor permitted to disclose it. We therefore think it the wiser and better course to adhere strictly to the declared policy of our law, and to hold that this letter was properly rejected, however important it may be in the determination of this case.

Judgment reversed on other grounds.

COMMONWEALTH v. GRIFFIN.

110 Mass. 181. (1872)

INDICTMENT for manslaughter. At the trial, before ROCKWELL, J., the Commonwealth offered to prove a conversation as to the alleged homicide between the defendant and his wife, while confined in jail, from the testimony of two officers who concealed themselves in the jail for the purpose of listening to the conversation, without the defendant and his wife knowing that the witnesses or any other persons were in hearing of them. The defendant objected to the admission of this testimony, but the judge admitted it. The jury returned a verdict of guilty, and the defendant alleged exceptions.

BY THE COURT. There is no rule of law requiring that third persons who hear a private conversation between husband and wife shall be restrained from introducing it in their testimony.

Exceptions overruled.

COMMONWEALTH v. CRONIN.

185 Mass. 96. (1904)

INDICTMENT, found on May 12, 1902, for an assault with intent to murder.

At the trial in the Superior Court before HARRIS, J., the defense relied upon was insanity caused by epilepsy. It appeared that after committing the assault in question the defendant, being pursued by persons who had come up, ran to a pond and threw himself in, and

was rescued from the pond in an unconscious condition. The defendant's wife testified to an illness of the defendant alleged to be epilepsy and was allowed without objection to testify in regard to the condition of the defendant as manifested by his symptoms. The defendant then offered to show by his wife that immediately upon coming out of this attack the defendant declared that he would drown himself. The judge excluded this evidence solely upon the ground that it was a private conversation between husband and wife. The jury returned a verdict of guilty; and the defendant alleged exceptions.

BARKER, J. The defendant's statement that he would drown himself was made in private to his wife. It was relevant to his condition of mind, but was made incompetent and inadmissible as evidence in his favor by the prohibition of the statute, "Neither husband nor wife shall testify as to private conversations with each other." R. L. c. 175, sec. 20, cl. 1. Fuller v. Fuller, 177 Mass. 184, and cases cited. It did not come within the reason of the exception which allows abusive language addressed by a husband in private to his wife to be given in evidence to show abusive treatment. See French v. French, 14 Gray, 186.

Exceptions overruled.

THE STATE v. THOMAS.

99 Mo. 235. (1889)

BRACE, J. At the March term, 1888, of the Criminal Court of Saline county, the defendant was indicted for murder in the first degree. The indictment, in two counts, charges him with having murdered John Lowry on the eleventh of October, 1884, in said county. He was arraigned, plead not guilty, and the case was continued until the September term, when it was set down for trial on the second day of January, 1889, at which time he was tried, found guilty of murder in the first degree, and sentenced to be hanged. His motion for new trial, and in arrest of judgment, having been overruled, he appeals, the Circuit Court staying the execution until his appeal be heard.

The admission of the minutes of the purported evidence of the witness, Leta Thomas, before the grand jury, written by one of the grand jurors, and which she signed at the request of the foreman, was error. The ancient rules excluding the evidence of a grand

juror as to any matter that transpired in the jury room, while the grand jury was in secret session in the discharge of its duties, founded upon considerations of public policy, the nature of the tribunal, and a tender regard for a juror's conscience, has been much relaxed in modern practice in those states in which the limitations upon such disclosures are measured only by the oath of secrecy which the grand juror is required to take, notable illustrations of which will be found in the following cases, as well as cogent reasons therefor: Commonwealth v. Hill, 11 Cush. 137; Commonwealth v. Mead, 12 Gray, 167; Gordon v. Commonwealth, 92 Pa. St. 216; State v. Broughton, 7 Ire. 96; Burdick v. Hunt, 43 Ind. 381; Bressler v. People, 117 Ill. 422, to which many others might be added.

In this state, the matter is regulated by statute, Section 1774, Revised Statutes, 1879, prescribes the oath which a grand juror is required to take, which is in the usual and ancient form.

Section 1793 provides that: "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto." Section 1791 provides that: "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with, or different from, the evidence given by such witness before such court, and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, upon his trial for such offense."

The evil sought to be remedied, by this legislation, was the immunity, which witnesses might enjoy under the old rule, from prosecution for perjury for swearing falsely before the grand jury, and from the discredit which would follow upon the deliverance, on trial, in open court, of evidence different from that delivered under oath before the grand jury. In other words, to remove, so far as was consistent with public policy, the temptation to false swearing before the grand jury. Under this statute, it was held in Twindle v. Nichols, 20 Mo. 326, in an action for slander for a charge of false swearing by plaintiff's wife before the grand jury, that a grand juror could not be permitted to testify what the wife testified to before the grand jury. And in Bean v. Link, 27 Mo. 261, which was an action for malicious prosecution, it was held that a grand juror could not be permitted to testify that defendants went before the grand jury, and testified as witnesses. In that case, Judge Scott, citing the former case, says: "This opinion is founded on the statute, and the statute

itself has its origin in principles of the common law. Grand juries are now, and have always been, sworn to secrecy. This oath restrained them from disclosing the evidence given before them. The clerk of the grand jury inquest could not be sworn as to matters that transpired before it. These considerations show that there is no reason in law for relaxing the force of the statute in relation to this subject." And in the former case, it was said: "These provisions of our statute concerning secrecy of grand jurors have their origin in the common law. Any person who may be present on the occasion is bound not to disclose what may transpire, and the jurors, themselves, are, by the terms of their oath, laid under the same obligations."

The extent, to which these common-law rules of exclusion have been relaxed, is to be measured by the terms of the statute, and extends only so far as, first, to permit a grand juror, who has heard a witness testify before the grand jury, to give evidence of what that witness testified to, upon a complaint against such witness for having committed perjury in such testimony, or upon his trial for such perjury, and, second, when a witness, who has testified before the grand jury, is being examined in the trial court, in regard to the same matter and has testified thereto, and it is sought to impeach his evidence (after laying a proper foundation therefor) by showing that he testified differently before the grand jury. In order that it may be determined whether the evidence given before such jury is consistent with, or different from, that given by such witness before such court, a grand juror may be required, as a witness on oath, to disclose the testimony given by such witness before the grand jury. The grand juror cannot be made the judge as to whether the testimony of such witness is consistent or inconsistent. He can only testify as to what the evidence of the witness was before the grand jury. It is for the traverse jury to determine the question of consistency or inconsistency, and give credit accordingly. And, when the testimony is thus disclosed under the solemn sanction of the juror's oath, according to the best of his recollection, that recollection may be tested by cross-examination. The minutes of the evidence kept by one of their number, unsanctioned by the oath of anybody, cannot be made a substitute for this fair, just and orderly way of getting at the evidence that was actually given before the grand jury.

While the statute permits "every grand jury to appoint one of their number to be clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall

be given to the prosecuting attorney" (section 1780, *supra*), it has nowhere authorized the admission of these minutes as evidence, anywhere, or for any purpose. They are not required to be signed, and not sworn to by anybody. They are not the statement, deposition or affidavit of the witness, but simply a memorandum, by which perhaps, a grand juror's memory might be refreshed, but upon which could not be shifted the responsibility of the juror's oath as to what the witness did actually testify. The juror, who wrote the minutes in this case, could not swear to what the witness testified to before the grand jury, and does not know whether she was ever asked whether it was her statement, when it was read to her. She signed it because the foreman told her to. He had no authority to require her signature. It was simply the *ex parte,* unsworn minute of the juror, who wrote it, of what he thought at the time was the substance of her testimony, but which he could not verify by his oath when called upon to testify.

In Iowa, where, under the statute, a grand juror may be permitted to disclose the evidence of a witness before the grand jury under the same circumstances as with us, it was ruled that the "minutes" of such witness' testimony are inadmissible. State v. Hayden, 45 Iowa, 11. The learned judge, delivering the opinion, remarked: "It is the duty of the clerk of the grand jury to take and preserve these minutes of the proceedings and of the evidence given before it. The witness is in no way connected with the act of taking these minutes of his testimony, they are not required to be read over to him, nor to be signed by him. Unlike a deposition or affidavit, they do not purport to give statements of facts, in full, but what the law requires, *mere minutes*. They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the district bench has enabled the writer hereof to observe, that the evidence taken before grand juries is often of the most indefinite and uncertain character, and, if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses and tend to defeat a proper administration of justice."

For such prejudicial error the judgment ought and must be reversed, and the cause remanded, for a new trial. It is accordingly so ordered. All concur; Barclay, J., in the result.

JONES v. REILLY.

174 N. Y. 97. (1903)

CULLEN, J. The plaintiffs, claiming to be the landlords instituted summary proceedings in a District Court in the city of New York to dispossess one Andrew Henderson from certain premises in said city for non-payment of rent.

On the trial the plaintiffs relied exclusively on the claim that the defendants' ancestor was in possession of the premises under a lease from them and as their tenant. This relation if established was sufficient to entitle them to a recovery. "No proof of title is required in this action when it is brought by a landlord, since if a tenant has once recognized the title of the plaintiff and treated him as his landlord by accepting a lease from him or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted, and that whether the action be debt, assumpsit, covenant or ejectment." (2 Taylor Landlord & Tenant, sec. 705; see Sedgwick & Wait Title to Land, sec. 351; Ingraham v. Baldwin, 9 N. Y. 45.) To show the relation between the parties the plaintiffs called as a witness the counsel for the defendants on whom they had previously served a subpœna *duces tecum* and asked him if he had in his possession a lease from Annie E. Jones to Andrew Henderson. Over the objection and exception of the appellants, who claimed that the inquiry was an invasion of the privilege of counsel, the witness, in compliance with the direction of the court, answered that he had. Under the further order of the court, made against like objection and exception, the witness was directed to produce the instrument, the signature to which by said Henderson was proved and the instrument put in evidence. It is claimed that this action of the court was erroneous and that the counsel could not be compelled to produce his client's papers. Such seems to have been the rule before the enactment of the statutory provisions by which parties to an action were made competent witnesses and compellable at the instance of an adverse party to testify the same as other witnesses. The privilege was that of the client, not of the counsel, and when by change in the law the client could be compelled by subpœna to produce documents in his possession, the rule that the attorney could not be forced to produce them when in his possession necessarily fell. The subject is elaborately discussed by the late Court of Common Pleas of the county of New York in Mitchell's Case (12 Abb. Pr. 249), and in

the conclusion there reached, that an attorney or counsel is obliged in answer to a subpœna to produce any instruments of his client which the latter could have been compelled to produce, we entirely concur. (See, also, People ex rel. Mitchell v. Sheriff of New York, 29 Barb. 622.)

Judgment reversed on another ground.

GABRIEL v. McMULLIN.

127 Iowa 426. (1915)

Suit to recover damages for an alleged slander and for a malicious prosecution. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals. Reversed.

SHERWIN, C. J. The plaintiff had been the defendant's housekeeper during her absence from home, and on her return, and after the plaintiff had left, she discovered that certain personal property had been taken from the house, whereupon she laid the matter before the county attorney of Mahaska county, Mr. J. A. Devitt, stated the facts to him and her belief that the property had been taken by the plaintiff, and asked him to have her arrested and prosecuted for the crime. Mr. Devitt, after several consultations with the defendant, had an information filed by a constable, and the plaintiff's arrest followed. The prosecution was thereafter dropped for want of sufficient evidence to warrant further proceedings.

On the trial of this case, Mr. Devitt was called as a witness for the plaintiff, and, over the defendant's objection that her statements to him were privileged, and in reality against his protest, he was compelled to testify to the entire conversation between himself and the defendant relative to the charge against the plaintiff. It was prejudicial error to receive this testimony.

But aside from the statute, we think the rule of exclusion should be applied to all matters concerning the administration of justice, on the ground of public policy. A county attorney is an officer whose duty it is to investigate crime and to prosecute therefor, not in the interest of the individual who may have suffered, but for the good of the state; and it is very clear to us that it is not only the privilege, but the duty, of every citizen who knows of facts tending to show the commission of a crime, to communicate such information to the

public officer whose duty it is to investigate the matter and to commence a criminal prosecution if a crime has been committed. Any other rule would hamper the administration of justice. A party having knowledge of facts tending to show that a crime has been committed will hesitate to lay such facts before the proper officer if the information thus given may be made the basis of an action for damages against him.

The judgment is reversed.

THOMPSON v. GERMAN VALLEY R. CO.

22 N. J. Eq. 111. (1871)

In this case, a subpœna *duces tecum* had been served upon his Excellency the Governor, commanding him by his individual name, to appear and testify before an examiner of this court, and to bring with him an engrossed copy of a private statute which had passed both houses of the legislature on the 30th of March, 1871, and been sent to him, as Governor, for his approval. The Governor declined to obey this subpœna, and sent to this court a letter now on file, stating that he did not decline out of any disrespect to the court or to the law, but because he thought his duty required of him not to appear or to produce the paper required, or to submit his official acts, as Governor, to the scrutiny of any court. An order was granted that the Governor should show cause why he should not appear and testify, and produce the copy of the act.

The Chancellor.

The subpœna was directed to the Governor, by his individual name, and not as Governor. Every person, whatever his office or dignity, is bound to appear and testify in courts of justice when required to do so by proper process, unless he has a lawful excuse. The official engagements and duties of the higher officers of government may be, and in many cases, are, a sufficient excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse, and whether the official engagements are sufficient, must be determined from the circumstances of each case. Whether the highest officer in the government or state will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such cases is, that he will be allowed to with-

hold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so. These were the rules adopted by Chief Justice Marshall in the trial of Aaron Burr. He allowed a subpœna *duces tecum* to President Jefferson and held that he was bound to appear, but that he should be allowed to keep back any document, or part of a document, which he thought ought not to be produced. 1 Burr's Trial, 182; 2 Ibid. 535-6.

If the Governor, without sufficient or lawful reasons, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal.

It is possible that there may be cases where courts, from the conduct of an Executive, might deem it proper to proceed against him for contempt. But this is not one of them, and the party here must be left to his civil remedy.

APPEAL of JOHN F. HARTRANFT et al.

85 Pa. 433. (1877)

This was the appeal of John F. Hartranft, Governor of the Commonwealth; M. S. Quay, Secretary of the Commonwealth; James W. Latta, Adjutant-General of the Commonwealth; General R. M. Brinton, and Major A. Wilson Norris, from the order of the Court of Quarter Sessions of the Peace of Allegheny county, allowing and directing attachments to issue against them in the matter of the investigation of the grand jury into riots at Pittsburgh, of July 21st and 22nd, 1877.

MR. JUSTICE GORDON. For the purposes of this case, however, we may admit the regularity of this subpœna and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, as the prime one of this case. In order to resolve this, we must first understand who the persons are, against whom the court has directed its attachment and for what purpose they have been subpœnaed. They are the Governor of Pennsylvania, the Secretary of the Commonwealth, the Adjutant-General, chief officers of the Executive Department of the state government, and two officers of the National Guard; the latter subordinates acting under the orders of the former. The purpose, for which these officers are subpœnaed, is,

that the grand jury may be put into possession of any information they may be possessed of, or that may be within the power of their several departments, concerning the military or other means used by them in the suppression of the late riots in the city of Pittsburgh. It will be observed that these persons are subpœnaed for the purpose of compelling a revelation of such things as have come to their knowledge in their official capacities, and which strictly belong to their several departments as officers of the Commonwealth. This is clearly set out in the answer, by the Attorney-General, to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the process, first and last, were against the Governor alone; for if he is exempt from attachment because of his privilege, his immunity protects his subordinates and agents. The general principle is, that whenever the law vests any person with the power to do an act, at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents; Vanderheyden v. Young, 11 Johns. 158, per Spencer, J.

It follows, if the Governor, as supreme executive, and as commander in chief of the army of the Commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge or information, coming into his department through himself personally or from his subordinates, may or may not be revealed, then such subordinates, without his permission, cannot be compelled to disclose, in court, any such matters or information.

WORTHINGTON v. SCRIBNER.

109 Mass. 487. (1872)

Tort against Charles Scribner, Andrew C. Armstrong, Edward Seymour, Arthur J. Peabody, and Charles Welford.

GRAY, J. It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.

The question now before us is not one of the law of slander or libel, but of the law of evidence; not whether the communications of the defendants to the officers of the treasury are so privileged from being considered as slanderous, as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. The reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense, and cannot be disclosed without the permission of the secretary of the treasury. And it is quite clear that the discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by bill in equity or by interrogatories at law.

Smith v. East India Co., 1 Phil. Ch. 50. McElveney v. Connellan, 17 Irish C. L. 55. Wilson v. Webber, 2 Gray, 538. The defendants therefore should not be ordered to answer the interrogatories.

TOTTEN, Administrator, v. UNITED STATES.

92 S. C. 105. (1875)

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims. The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid $200 a month.

The Court of Claims finds that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting information to the President; and that, upon the close of the war, he was only reimbursed his expenses. But the court, being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim, and dismissed the petition.

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the others were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of

service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes an action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Judgment affirmed.

EXAMINATION OF WITNESSES.[1]

MANN v. STATE.

134 Ala. 1, 32 So. 704. (1902)

The appellant, Charles B. Mann, was indicted and tried for the murder of David Dickson, was convicted of murder in the second degree, and sentenced to fifteen years in the penitentiary.

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[1]Hughes on Evidence, p. 319.

The bill of exceptions contains the following recitals as to the opening statement of counsel: "During the course of the opening statement of counsel, the defendant's counsel having stated what he expected the evidence would show as to the reasons which actuated the defendant at the time of the homicide, the solicitor in reply stated 'The State expects the evidence to show that when the defendant was asked on *habeas corpus* trial as to what he had reference to when he told the deceased "you must get down on your knees and apologize," he testified that he had reference to the deceased coming to his office and assaulting him with a knife, had reference to his calling him a son of a bitch in the presence of a negro, and had reference to his drawing a pistol on him that evening.' The defendant moved to rule out the statement upon the ground that the defendant has not testified and it is not known that he will testify, because the statement, if made, is not in the nature of a confession. The court denied the motion, and the defendant excepted, the court stating that he would tell the jury that they should pay no attention to the statements of counsel."

MCCLELLAN, C. J. It is difficult to conceive upon what ground an objection to the opening statement of the solicitor as to what he expects the evidence will show can be predicated. Issues cannot be taken upon the existence of his expectations in that regard: It cannot be asserted in any way that we know of either that he does not expect this or that testimony to be forthcoming, or that, though he believes this or that testimony to be in existence, he does not expect the court to receive it in evidence. At most, these preliminary statements, when resorted to in our practice—whether resorted to at all or not in any case is within the election of counsel—are tentative and intended to give the jury a general grasp of the case that they may be the better able to understand and apply the facts as they are developed in the course of the trial; and they constitute no evidence of the facts nor in any sense take the place of evidence. That part of the statement of the solicitor in this case to which objection was made, moreover, would be unobjectionable even were it conceded that such statements are open to challenge in this way. The facts which the solicitor stated he expected to prove were in rebuttal of the line of defense set forth in the preliminary statement of defendant's counsel, and evidence of them was actually and properly received on the trial. The court committed no error in declining to "rule out" the solicitor's statement, which the judge did in terms, but at the same time said that he would instruct the jury to "pay no attention to the

statements of counsel." It is proper to remark that this declaration was too favorable to defendant. The presiding judge doubtless intended to instruct the jury to pay no attention to the statements as *evidence*, for of course, it was their duty to be attentive to these statements as statements of counsel going to show what they expected the evidence to be.

Affirmed.

BARHYTE v. SUMMERS.

68 Mich. 341; 36 N. W. 93. (1888)

MORSE, J. This was an action brought originally in a justice's court by the plaintiff, alleging that the defendant sold to him a horse which he knew to be unsound, fraudulently representing said horse to be sound "as far as he knew."

The two vital questions upon the trial in the circuit, to which court it was appealed, were:

1. Was the horse unsound, lame, at the time of the sale?
2. If so, did the defendant know of such lameness?

The court in the course of the trial, and while the plaintiff had the case, said to plaintiff's counsel:

"You have called five witnesses as to the condition of this mare before the sale, How many more do you propose to call?"

The counsel answered that it was a vital point in the issue, and he did not know as there was any limit.

The Court. "I don't think it ought to be a question of mere numbers; five witnesses are as good as five hundred. I think I will draw the line there."

But he finally allowed plaintiff to examine seven witnesses upon this point, saying that he should permit no more to be sworn; and stating:

"You have already called seven witnesses showing that the horse limped. It must be pretty well established if it ever can be."

The counsel for plaintiff then offered to swear other witnesses to the fact that they had seen the horse limp before the sale to plaintiff, and this offer being denied, plaintiff's counsel took exception.

When the defense was proving the issues upon its part, and had examined seven witnesses to disprove the lameness of the horse, and offered the eighth for the same purpose, the court said:

"I think you have exhausted your number. You had seven before you called Mr. Kirk (the witness offered)."

The counsel for the defendant then said that he desired to offer the testimony of 12 additional witnesses to the effect that they had known the mare for weeks and months prior to the sale to plaintiff; had seen her frequently; that they had seen her at the barn, seen her exercised, and that she was sound and all right up to the date of the sale.

The court excluded the offered testimony, and defendant's counsel excepted. He was permitted afterwards to show by three witnesses, other than the seven, and by the defendant, that they were present at some of the times when the lameness was observed by plaintiff's witnesses and noticed nothing of the kind.

The jury found in favor of the plaintiff.

The counsel for defendant claims that the remarks of the trial judge made to plaintiff's counsel about the value of the testimony of five witnesses, and the lameness of the animal must be pretty well established by the seven witnesses if it ever could be, were improper, and tended to prejudice the defendant. The remarks were certainly not proper, but whether they tended more to the injury of one party than another we are not able to determine; nor is it necessary to do so, as the case must be reversed, and a new trial granted, for another reason.

The court committed substantial error in limiting the number of witnesses to be sworn by either side upon a material and one of the main issues in the suit. The counsel for the plaintiff frankly admit that if the suit had gone against their client, they should have asked for a reversal here upon the same ground that defendant now urges; but they argue that under the ruling no harm was done to the defendant, but that he in fact reaped an advantage by being permitted in the end to swear more witnesses upon the point of lameness of the horse than the plaintiff.

But the defendant was entitled to offer and produce all the proof he had upon this matter, and it is impossible to say that the denial of such right did not prejudice his case.

We do not consider it necessary to notice the other assignments of error, as upon another trial the question is not likely to arise.

The judgment of the court below is reversed, with costs, and a new trial granted.

The other justices concurred.

BELDEN v. ALLEN.

61 Conn. 173. (1891)

ANDREWS, C. J. Alice A. Belden of New Britain, a minor about the age of thirteen years, brought an action in the Court of Common Pleas for Hartford County at its January term, 1891, by her father, James M. Belden, as her guardian and next friend, against William H. Allen. The complaint was in two counts—one in the nature of trespass for taking and carrying away certain personal property; the other in the nature of trover for the same articles of property. The answer was a general denial. At the trial the plaintiff offered testimony tending to prove that the title to the property was in her, proved its value, and rested her case. James M. Belden was in court, but did not offer his own testimony in chief. The defendant did not deny that he took the property, but claimed that he was a constable and attached the property by virtue of a writ against the said James M. Belden, and offered testimony tending to prove that it belonged to the said James in his own right and not to the said Alice. After the defendant had rested his case, James M. Belden was offered as a witness in reply. Certain testimony that he gave was received without objection. "The plaintiff then offered," in the words of the finding, "to show by this witness and by an exemplified copy of the record of the inventory filed by him as the administrator in the court of probate, and accepted by that court, as the inventory of the estate of the mother of the plaintiff, that at the time of the purchase of the property in question he had in his hands funds derived from the estate of the plaintiff's mother which he had expended in the purchase of the property for the plaintiff. Upon the objection of the defendant that this was a part of the plaintiff's case in chief, and was not proper evidence in rebuttal, the court excluded it."

We think this ruling was correct. Under the pleadings it was the duty of the plaintiff to establish her own title to the personal property in dispute.

"The rule upon the subject is a familiar one. Where by the pleadings the burden of proving any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his claim. He cannot go into half his case and reserve the remainder." Nathaway v. Heminway, 20 Conn. 191.

The evidence excluded was direct evidence to prove title in Alice, and it was only because it proved such title that it tended to disprove

title in James M. It was not rebutting testimony, but affirmative testimony to strengthen the claim made by the plaintiff. It is true that the order in which testimony shall be given upon a trial is subject to the discretion of the court, but this discretion should be exercised with great caution. The rule may be departed from when its operation will cause great injustice. It ought not, however, to be so frequently disregarded as to render it a rule in name and not in reality. There was nothing in this case calling for this discretionary power.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

ALQUIST v. EAGLE IRON WORKS.

126 Iowa 67; 105 N. W. 805. (1904)

Suit to recover for personal injuries received while in the service of the defendant. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals. Reversed.

SHERWIN, J. The defendant is a corporation operated through its agents and the plaintiff at the time of his injury was employed to operate a stationary engine which was used for running the machinery in its foundry. He was directed by the appellant's manager to move a certain fan which was run by a belt and in doing so he received the injury in question. On the same day, but several hours thereafter, and after the plaintiff had been removed to his own home, his wife went to the manager's office for the purpose of collecting the wages then due to the plaintiff for past services; and while there she was told by said manager, in answer to her question whether it was her husband's "fault that he got hurt," that it was not; "that he couldn't do it any other way. He was told to fix that thing." This conversation the plaintiff's wife was permitted to detail to the jury in her examination in chief, over the objection of the appellant. It is manifest that this statement of the manager had no relation to the payment of the money then due for the husband's services, and that it was incompetent, under the general rule, and under our own holding in McPherrin v. Jennings, 66 Iowa, 622. The latter part of the statement would have been competent in rebuttal of the testimony of the manager that he did not direct the plaintiff to move

the fan, and were this, in effect, all that the statement amounted to, we would not reverse the case on account of the ruling, because it would then be a question of the order of introducing testimony, and nothing more. But the statement was much broader than this, and involved his conclusion that the plaintiff was not guilty of contributory negligence in obeying his orders and in doing the work. That it was prejudicial to the appellant is clearly apparent.

For the error in admitting the testimony referred to, the case is

Reversed.

ROLLINGS v. THE STATE.

160 Ala. 82; 49 So. 329. (1909)

MAYFIELD, J. Accused was indicted for murder, and was convicted of manslaughter in the first degree, from which judgment of conviction he appeals. There was no question or dispute that defendant killed the deceased, intentionally, by shooting him with a gun and a pistol. There was no question as to the identity of the accused nor as to that of the deceased. The sole dispute was whether or not defendant acted in self-defense. If he did not, the only question for the jury was the degree of the crime and of the punishment to be inflicted.

It was clearly competent to show that defendant had a pistol prior to the killing. It might tend to show preparation for the crime, and was admissible for this purpose, if for no other. It was also proper to allow the state to prove that, several hours prior to the killing, deceased had no pistol. The accused relied upon self-defense, and his evidence was to the effect that deceased was attempting to draw a pistol, with which to shoot accused, at the time the fatal shots were fired. Therefore that deceased, several hours before the encounter, had no pistol, was a circumstance legitimate to disprove the only defense attempted. Its tendency may have been very slight, but, no matter how slight, it was competent for this purpose. The state had a right to show that deceased was unarmed at the time of the killing, and to show that he did not have the saddlebags with him at the time he was killed, as claimed by the accused, and also that he was not in the habit of carrying them, as was claimed and attempted to be proven by the accused. All this evidence had a tendency to disprove the only defense attempted to be set up. Wiley's Case,

99 Ala. 146, 13 South. 424; Naugher v. State, 116 Ala. 466, 23 South. 26.

The character of the wife of the defendant was wholly irrelevant and immaterial on this trial, as a substantive fact. Evidence of improper relations between her and deceased might be relevant to show malice or motive on the part of the accused, or have a tendency to show who provoked or brought on her difficulty, and proof of this improper relation would, of course, be evidence of bad character; but the improper relations cannot be proven by evidence of her bad character. The state should not have been allowed, over the objections of the accused to prove the general character of his wife or her character for chastity. She was not a witness, and could not be a witness for or against him. Proof of her bad character could not go to the credibility of the defendant or his other witnesses, nor is he criminally or civilly liable for her character as to chastity. Her chastity of itself would not justify him in killing the deceased, nor would her unchastity make him guilty when, but for it, he would be innocent. The character of the wife cannot be made a direct subject of inquiry, on a trial of the husband for crime, when she is not a witness and not interested in, nor in any manner connected with, the prosecution or defense. It was not a subject of inquiry in this case, except in so far as it involved by showing improper relations between her and deceased, and these relations could not be shown by proof of her character. We know of no authority for allowing proof of the good or bad character of a third party or stranger to a suit, when not a witness. 1 Elliott on Evi. 168.

The clothing of deceased, as well as that of the accused, letters found on the body of deceased, the instruments causing the death, photographs of the deceased and accused, maps and plats of the scene of the crime, pieces of cloth, buttons, gun wadding found near the scene of the crime, bullets cut from house and trees near such scene, blood stains, etc., are usually held admissible on trials of homicide. There are only a very few cases in which they have been excluded, when offered as evidence for the inspection of the jury, if tending to elucidate the transactions, to identify any of the parties, to connect the accused with the crime, or to show the character of the wound, motive or intent of the killing, or degree of the crime—whether the killing was in self-defense or not. If such objects tend to corroborate or disprove, illustrate or elucidate, any other evidence they are admissible though such evidence may have a tendency to bias or prejudice the jury, or to elicit their sympathy for, or ani-

mosity toward, either the deceased or the accused. 7 Mayfield's Dig., p. 390. But in order for such objects to be admissible in any case, civil or criminal, they must have some tendency to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, to corroborate or disprove some other evidence offered or to be offered. They must have some tendency to shed light upon some material inquiry. Circumstances or facts, to be admissible in evidence, or relevant on a trial, must tend either to prove or disprove some matter in issue, in order that the attention of the jury may not be distracted from such matters in issue. The test of the relevancy of the evidence in criminal cases is whether it conduces to the proof of a pertinent hypothesis—one which, if sustained, would logically influence an issue on trial. Whittaker v. State, 106 Ala. 30, 17 South 456; Curtis v. State, 118 Ala. 125, 24 South. 111; McCormick v. State, 102 Ala. 161, 15 South. 438; Campbell's Case, 23 Ala. 44; Gassenheimer's Case, 52 Ala. 313.

The wearing apparel of deceased, showing the location of the bullets, the character and nature of the wound, the blood stains, etc., were properly admissible under the rules stated above, and it is no reason to exclude them that these matters might be shown by other evidence, or that these objects might prejudice the jurors. Being admissible, they should not be excluded for these or any other reasons. But we are unable to conceive of any relevancy that the saddle of the deceased, which he was riding when killed, could have to any issue of this case. What relevancy could the suspenders he was wearing at the time, or the tobacco, keys, or ring, found on his person, have to any issue on trial? They bore no marks of bullets, no blood stains, and afforded no evidence of any violence. They had no tendency to show how, by whom, or in what manner, deceased was killed, or whether he was killed or not; and no other facts, singly or collectively, tended to make them relevant for this or any other purpose. The *corpus delicti* was admitted. There was no issue as to the identity of deceased or that of accused. They did not, singly or collectively, tend to prove or disprove self-defense—the only disputed issue. The only effect of introducing them in evidence was to unduly prejudice the views of the jury—arouse their sympathy for deceased and to prejudice them against the accused. The court should have excluded all such articles, as having no tendency to prove or disprove any issue on trial. As said by this court in Perason's Case, 97 Ala. 219; 12 South. 180; "sympathy or indignation once aroused in the average juror readily becomes enlisted to the

prejudice of the person accused as the author of the injury. Human feelings are easily excited by the exhibition of objects which appeal to the senses." In that case a shoe only, which was worn by deceased when he was killed, was allowed in evidence, and it was a civil action; and yet it was held reversible error, for that reason. In Robinson's Case, 108 Ala. 14, 18 South. 732, which was a trial for murder, a letter from the pocket of the deceased was held not to be admissible because it could shed no light on the transaction. In that case the evidence is explained, and the reasons are assigned why it was not admissible, and circumstances given under which it might have been admissible. There are cases where all the articles offered in this case might have been admissible, but this particular case does not fall within such class.

The court very properly declined to allow counsel for defendant to ask the witness Stephens if his memory then, as to the facts to which he was testifying, was any better than it was, as to matters on the preliminary trial. This was calculated and intended as a mere argument with the witness. It was likewise wholly irrelevant whether Pick Roden was at the funeral. The court very properly declined to allow proof as to this.

It was proper to allow proof of flight by defendant, soon after the killing, and to do this it was proper to prove the direction of his flight, the mode of his travel, the places to which he went and those he avoided, in fact, to prove his conduct and demeanor soon after the killing and while fleeing; but we are unable to see what relevancy the fact that the captain of the steamboat was related to defendant could have on any issue. It was clearly inadmissible, but we cannot discern any possible injury or good to come of it.

It might be very important to know how and when the defendant obtained the pistol with which he shot deceased; and the court properly allowed proof of that fact.

It was wholly irrelevant and inadmissible to allow the state to prove the genealogy of the wife of the defendant, the pecuniary condition of her family, that her brother had no home, that her father was dead, etc. This was highly improper. Such matters could only unduly and improperly elicit sympathy for the wife, and for the deceased, who seems to have supported her and lived with her and to have had improper relations with her.

The character and the pecuniary condition of the wife and the merits of the divorce proceedings between her and her husband, should not have been gone into. This trial was not the proper time

or place to inquire into these matters, which were wholly "*res inter alios acta.*" The facts of the separation of the husband and wife, the pendency of divorce proceedings, the relation of the deceased to these matters, might be proper; but it was not proper to go into the details and the merits of these controversies.

It was competent for the state to prove that the defendant had been convicted of manslaughter. He made himself a witness, and this evidence was therefore admissible, to go to his credibility, and the fact that he, as a witness, admitted the conviction and sentence, did not prevent or preclude the state from proving it by record evidence; but this evidence went to his credibility only as a witness, and should have been so limited by the court, on request of the defendant. It was not admissible for the purpose of showing that, because he was guilty of manslaughter for killing Manning, he was also guilty of manslaughter in Killing Roden, the deceased, for which he was then on trial.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

PAGE v. PARKER.

40 N. H. 47. (1860)

In the deposition of Arioch Wentworth, introduced by the plaintiff, is the following question and answer on direct examination by the plaintiff, to wit: "State whether or not any of this stone was so hard that it could not be sawed with the common saw used in sawing soap-stone."

Ans. "I should think some of it was so hard it would be rather difficult." The defendants objected to the question, as leading, at the caption of the deposition and also on the trial, but it was admitted.

FOWLER, J. A variety of questions are raised by the case, and have been discussed by counsel, to only a portion of which have we found it necessary to direct our attenion in arriving at a conclusion.

The question proposed to Arioch Wentworth in his deposition was manifestly leading. It suggested a material fact in such a way as to indicate very decisively to the witness that he was ex-

pected to verify its truth by his answer, and might have been answered by a simple affirmative or negative. It was an argumentative or pregnant interrogatory, assuming the existence of a particular condition of the soap-stone, which had not been proved, but which the witness was evidently expected to establish. 1 Gr. Ev., sec. 434; Bartlett v. Hoyt, 33 N. H. 165; Dudley v. Elkins, 39 N. H. 78; Spear v. Richardson, 37 N. H. 23.

A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, as was here done, or plainly suggests the answer which the party wishes to get from him, whether it be put in the alternative form or not. 2 Phill. Ev. (Edwards' Ed.), ch. 10, sec. 1, and notes; People v. Mather, 4 Wend. 229; 1 Stark. Ev. 123; Courteen v. Touse, 1 Camp. 43; Snyder v. Snyder, 6 Binn. 483.

Exceptions sustained—new trial granted.

COMMONWEALTH v. DORR.

216 Mass. 314. (1914)

RUGG, C. J. The defendant was indicted for the murder of one George E. Marsh. The defendant admitted the killing, but asserted that it was in self defense. It was undisputed that the deceased died instantaneously, from bullet wounds received from the defendant.

Two witnesses were called by the Commonwealth for the purpose of identifying the button found in the road near the place where the body of the deceased was discovered, and being a button from the coat of the defendant. The button was shown to each of the witnesses and then inquiries were made about it. The defendant objected upon the ground that it was a leading question, to present an article to a witness with an inquiry about it. But even if it be treated as a leading question, this is not ground for setting aside the verdict. Within reasonable limits, leading questions may be permitted as matter of discretion by the presiding judge. Moody v. Rowell, 17 Pick. 490, 498. York v. Pease, 2 Gray, 282. Green v. Gould, 3 Allen, 465. Commonwealth v. Meserve, 154 Mass. 64, 68.

Exceptions overruled.

CHRISTENSEN v. THOMPSON.

123 Iowa 717. (1904)

WEAVER, J. The plaintiff, a married man, charges the defendant with alienating the affections of his wife, and inducing her to abandon her husband and home. Defendant denies the charge, and says that if the wife has been alienated from her husband, it has been caused by the husband's ill treatment. Upon trial to a jury, verdict was returned in plaintiff's favor for $500, and from the judgment entered therein defendant appeals.

The plaintiff, as a witness in his own behalf, having testified that on one or more occasions, coming home from his work, he had found defendant there, he was asked by his counsel "Was he ever there when he did not have any business there, at night, that you know of?" Over the defendant's objection the witness was allowed to answer: "A. I don't know that he did, or was coming to ask her to come over and bake bread for him; something like that. I won't say that. I don't think he did always. I did not get suspicious of him. The first I thought anything was wrong, the children commenced to talk. After my wife left, I had a talk with Thompson about it." Error is assigned upon this ruling, because, it is said, it called for the mere conclusion or conjecture of the witness. It is to be admitted that the form of the question leaves it open to the construction which appellant puts upon it, but when fairly interpreted it is not objectionable. It is, in effect, as if counsel had asked, "What was his errand there?" or, "Do you know whether he had any errand there?" in which form we think the inquiry would have been allowable. But, even if we were to hold that the objection should have been sustained, the answer discloses nothing which was not properly admissible in evidence, and the error would be without prejudice.

It is further objected in argument that the answer was not responsive to the question, but this point was not made in the court below, and, moreover, the objection of want of responsiveness is not available except to the party propounding the interrogatory.

The same witness was asked, "What did he (defendant) say to you about her not being your wife—something like that?" Defendant's objection to this question was overruled, and the witness answered "He said, 'Your wife leave you, and she is not your wife any more, and I have a right to take her wherever I want to.'" The question

was quite leading; a form of interrogatory which should not ordinarily be permitted; but its allowance is so far a matter within the discretion of the court that it will not justify a reversal save where that discretion has been abused. It appears from the record that the parties are of foreign birth, and their command of the English language quite imperfect. Under such circumstances direct and leading inquiries are often permissible, if not, indeed, necessary. The answer called for by this question was competent and material. It is true the alleged conversation took place after plaintiff's wife had left him, but the conduct and statements of the defendant with reference to her, and his disposition, if any, to seek her society in defiance of her husband's wishes, were circumstances having more or less bearing upon the truth of the charge of prior intimacy between them.

One Williamson, a witness for plaintiff, testified that he was the pastor of the parties, and that, after the separation had taken place, he met them at a neighbor's house, and sought to induce plaintiff's wife to return to her husband, but that she and defendant said they "wanted to be cleared first." On cross-examination he was asked what the wife said in that conversation about having been accused by her husband of improper conduct with men other than defendant. Upon objection by the plaintiff, answer to this question was ruled out as not being proper cross-examination. The objection could well have been overruled without error, but the same witness did answer later that Mrs. Christensen did say that on a former occasion her husband had become jealous of one Hayfeldt, and had found fault with her several times before about other men. The wife herself also testified to such accusations against her by the plaintiff, and everything which could have been obtained by allowing the question to be answered by the pastor seems to have gone to the jury. The defendant suffered no prejudice by the ruling.

The judgment of the District Court is affirmed.

MAYVILLE v. FRENCH.

246 Ill. 434; 92 N. E. 919. (1910)

MR. JUSTICE CARTWRIGHT delivered the opinion of the court.

Permelia Brown died in Chicago on July 9, 1909, possessed of real and personal property and leaving a last will and testament dated December 1, 1904, and a codicil dated December 28, 1907, which were admitted to probate in the Probate Court of Cook County. The appellant, Anthony Mayville, her nephew, filed his bill in this case in the Superior Court of Cook County, setting forth the two instruments and charging that they were not executed according to law; that she was in her dotage and not of sound mind and memory and that the will was the product of undue influence exercised upon her by interested persons, and praying that the instruments be declared null and void and the probate set aside. Issues were made up and submitted to a jury, which returned a verdict that the instruments were her last will and testament. The court entered a decree on the verdict, and an appeal was prosecuted to this court.

There were some rulings on the admission of evidence which were excepted to. Some of them related to receiving opinions of the witnesses as to the mental capacity of the testatrix and her capacity to transact business. The witnesses had known her for a considerable period of time and had stated their opportunities for observation and the facts on which their opinions were founded. In this class of cases witnesses, after showing such facts, may give an opinion. In the case of the attorney who drew the will and codicil and was present at their execution, questions were objected to on the ground that they were leading and suggestive. The witness had already testified that the testatrix was of sound and disposing mind and memory, and his answers to the leading questions did not add anything to the testimony already given. It need not be said that he needed no suggestion as to what was wanted and that he was not aided by any. The manner in which questions may be put to a witness is largely in the discretion of the trial court, and while some questions put to the attorney were leading in form, there was no injury to the appellant from the ruling.

None of the rulings of the court which were excepted to would justify a reversal of the decree, and accordingly it is affirmed.

Decree affirmed.

GRANGER v. DARLING.

156 Mich. 31; 120 N. W. 32. (1909)

GRANT, J. Plaintiff was calling at the house of the defendant on business. As she was upon the steps leading into the house, she was attacked and bitten by a dog, claimed to be the defendant's. She brought suit against him and recovered a judgment for $500.

Defendant called a wtness named Andrew Messick, and asked him: "Have you been paid for being a witness in this case more than the regular fee?" Counsel for plaintiff objected to the form of the question, in that it was suggestive and leading, and it did not appear that witness knew what the regular fee is. The court sustained the objection, and stated that defendant's counsel could ask witness in any other form about what he had been paid, if he desired. Counsel did not take advantage of the offer. There was no error in the ruling.

Judgment affirmed.

BLAIR, C. J., and MONTGOMERY, MOORE and MCALVAY, JJ., concurred.

PEEBLES v. O'GARA COAL CO.

239 Ill, 370; 88 N. E. 166. (1909)

This is an action on the case brought by defendant in error in the Circuit Court of Saline county to recover damages for injuries sustained by him while at work as a miner in plaintiff in error's mine, Aug. 13, 1906.

The declaration originally consisted of four counts. The third count having been withdrawn by defendant in error, the case was tried on the first, second and fourth counts, and plaintiff in error was found guilty by the jury on the first and fourth only, the verdict and judgment being for $1500. This judgment was affirmed by the Appellate Court on appeal, and a writ of error has been sued out from this court.

MR. JUSTICE CARTER delivered the opinion of the court.

Plaintiff in error further complains that the trial court improperly permitted defendant in error's counsel to ask leading questions

of his witnesses. A question is leading when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. (2 Elliott on Evidence, sec. 836.) Defendant in error contends that in many of these questions objected to, the examiner avoided the grounds for objection by using the term "whether or not". This does not necessarily keep the question from being leading, as it still may suggest to the witness the answer desired. (2 Elliott on Evidence, sec. 837.) In Daugherty v. Heckard, 189 Ill. 239, in discussing this subject we said (p. 246): "The propriety of admitting or excluding leading questions is within the sound discretion of the trial court. In some of the states this discretion is not subject to review; in others the rule is that a manifest and injurious abuse of the discretion may be corrected in the courts having appellate jurisdiction. The latter rule obtains in this court." In Funk v. Babbitt, 156 Ill. 408, the rule was laid down that the allowance of leading questions would only be ground for reversal when the discretion of the trial court was palpably abused and substantial injury done. The questions objected to as leading are quite numerous. It is sufficient to say that we have examined them, and think, under the rules stated above, they were within the bounds of the discretion vested in the trial court, and that the answers to such questions were not on this record, prejudicial to plaintiff in error. It may be noted that some of these questions come within the rule laid down in Swartwout v. Evans, 41 Ill. 376, in merely directing the witness' attention to the particular point in controversy, and therefore were not improper.

Plaintiff in error further insists that the court erred in its ruling as to a certain question asked of one of its witnesses, and the answer thereto. The question was double in its nature, and it is apparent from the record that the part of the question that counsel desired answered was afterward asked and answered, so that no harm was done by the ruling.

We find no reversible error in the record, and the judgment of the Appellate Court will therefore be affirmed.

KANKAKEE v. ILLINOIS CENTRAL RY. CO.

258 Ill. 368; 101 N. E. 592. (1913)

MR. CHIEF JUSTICE DUNN delivered the opinion of the court.

The city council of the city of Kankakee passed an ordinance for the paving of a part of East avenue from the north line of Hickory street to the north line of River street and of a part of River street from the east line of East avenue to the west line of Washington avenue, and directed that the whole cost of the improvement should be paid by special taxation to be levied upon the property contiguous to and abutting thereon, in the proportion of the frontage of each lot, block, tract, or parcel of land and property. * * * The railroad company objected to the confirmation of the assessment roll but its objections were overruled, and this appeal is from the judgment of confirmation.

In examining a witness called for the purpose of sustaining the assessment appellee's counsel asked the following question in chief: "I show you now the assessment roll filed in this case, with an assessment total of $6799.61 assessed against that portion of the Illinois Central right of way lying between the north line of Hickory street and the south line of River street, and I will ask you whether in your opinion that assessment exceeds the benefits that that property will derive from this improvement?" The question was objected to as leading, and the witness answered: "No sir; I don't think it does, according to my assessment." Substantially the same thing occurred with another witness. The objection should have been sustained. The question merely set up a mark for the witness to hit. That question was the ultimate fact to be determined. Witnesses could properly be called upon to give an opinion as to the amount that the property was benefited but not to determine the whole issue.

Reversed and remanded.

ANDERSON v. BERRUM.

36 Nev. 463; 136 Pac. 973. (1914)

By the Court, TALBOT, C. J.:

Plaintiff brought this action to recover for trespass by defendant's band of about 2,800 sheep. In the complaint filed upon the commencement of the action, the different items constituting the damage, but not the amount claimed for each, were stated, and an aggregate sum of $350 demanded, and, after demurrer was interposed and sustained, plaintiff filed an amended complaint in which he asked judgment for twice that amount, and specified the sums he claimed for the different acts causing the damage.

According to the amended complaint, it is sought to recover as damages $350 for herding and grazing the sheep upon the lands of the plaintiff, and the eating, and tramping of the grass and verdure so it would not replenish, $50 for knocking down a part of the piles of cordwood which plaintiff had upon the land, $150 for tramping and filling with rocks and debris the road and trails used by the plaintiff for packing wood, and $150 tramping, choking up, and filling springs which were situated on the land, and which were used by plaintiff for household, stock, and domestic purposes, and for fluming wood.

Over the objection of the defendant, the court allowed plaintiff to answer upon his redirect examination several leading questions which put into his mouth words of his attorney.

In this and in most jurisdictions in this country, the cross-examination must be limited to matters stated in the examination in chief and questions to test the accuracy, veracity, and credibility of the witness. (Buckley v. Buckley, 12 Nev. 423; Furguson v. Rutherford, 7 Nev. 385; Cokely v. State, 4 Iowa, 477; People v. Miller, 33 Cal. 99; Houghton v. Jones, 68 U. S. 706, 17 L. Ed. 503; Hughes v. Coal Co., 104 Pa. 207; Hurlburt v. Meeker, 104 Ill. 541; Jones on Evidence, sec. 820.)

This rule does not prevent the cross-examining party from making the witness his own after the adverse party has closed his case in chief, and does not prevent the court from allowing, in its discretion a rigid examination of the witness if he is hostile. (Nash v. McNamara, 30 Nev. 143, 16 L. R. A. n. s. 168, 144 Am. St. Rep. 694; Houghton v. Jones, 68 U. S. 706; 17 L. Ed. 503.)

On cross-examination it is competent to call out anything to modify

or rebut the conclusion or inference resulting from the facts stated by the witness on his direct examination. (Wilson v. Wagar, 26 Mich. 452.)

There was no good reason for allowing questions so flagrantly leading, such as the hostility or lack of understanding of the witness, and this testimony does not come under any of the exceptions to the rule forbidding the putting to a party of the action of leading questions by his own attorney. As an excuse for asking these leading questions, it is said that when a party brings out new matter upon cross-examination he makes the witness his own, and that leading questions may be asked upon re-examination. (People v. Court, 83 N. Y. 438.) But no such rule applies to new matter which is properly a part of the cross-examination of the witness, or relating to matters testing his accuracy or veracity, and it ought not to apply to a party to the action when he is being interrogated by his own attorney. The reasons which allow a litigant to call the opposing party or a hostile witness to the stand and ply him with leading questions should ordinarily preclude the asking of leading questions on his cross, redirect or any examination by his own attorney. If the bounds of proper cross-examination are not exceeded, and they were not in this instance, the witness is deemed to be continually the witness of the party introducing him. (Stephen's Digest of the Law of Evidence, Chase ed. art. 127, note 1.)

The questions which the defendant's attorney asked the plaintiff relating to his having claimed, in an action brought in the justice's court and in the original complaint in this action, about half the amount of damage he claimed on the trial were proper cross-examination, because they tended to test his accuracy or vary his testimony. (Stephen's Dig. of Ev. art. 129; Jones on Ev. sec. 822.) They did not relate to new matter in any way authorizing his own attorney to ply him with leading questions. The same rule applies to any witness, but for greater reasons to a party to the action. Although on redirect examination the allowing of these leadings questions was unfair and improper, it is not deemed reversible error, and especially in view of the conclusion that the judgment must be reduced or the case remanded for a new trial, under the claim that the verdict is excessive, and that the evidence will not sustain a recovery for more than $350. After it had been shown that the plaintiff had brought the suits originally for less than the amount of damage he claimed upon the trial, it would have been proper for his attorney to have asked him to explain why he had sued for less than he was claiming,

and, if the leading questions had been disallowed, as they should have been, no doubt by direct questions the plaintiff's reasons would have been elicited.

Whether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules regarding them is not ordinarily a ground for reversal. (State v. Williams, 31 Nev. 360; 1 Greenleaf, Ev. sec. 435; Jones Ev. sec. 819; 1 Wigmore, Ev. sec. 776; Maguire v. People, 219 Ill. 16, 76 N. E. 67; City of Witman, 122 Ind. 538, 23 N. E. 796; Gibson v. Glizozinski, 76 Ill. App. 400; Peters v. U. S. 94 Fed. 127, 36 C. C. A. 105; State v. Whalen, 148 M. 286, 49 S. W. 989.) But the improper allowing of leading questions may be so prejudicial as to require reversal. (Woodruff v. State, 72 Neb. 815, 101 N. W. 1114; State v. Hazlett, 14 N. D. 490; 105 N. W. 617; Turney v. State, 8 Smedes & M. 104, 47 Am. Dec. 75.)

As a considerable sum, but something less than half of the $350 claimed for grazing and eating the grass, may have been allowed by the jury for grazing and eating the grass on the Yerington lands, it is evident that the judgment should not stand for the full $500 awarded by the verdict. If within ten days the plaintiff files in this court a written consent thereto, an order will be made that the amount of the judgment be reduced to $350, and that the costs of the appeal be paid by the plaintiff. If such consent is not filed, the judgment will be reversed, and the case remanded for a new trial.

ROBINSON v. N. Y. ELEVATED R. R. CO.

175 N. Y. 219. (1903)

BARTLETT, J. This is the usual elevated railroad case to recover free and rental damages, and under the unanimous decision the defendant railway companies are confined to the argument of legal errors duly raised by exceptions.

The counsel for the appellants insist that the learned trial judge admitted, over objection and exception, evidence regarding sales and rentals of specific pieces of property on Pearl street other than the premises in suit, in violation of the rule laid down by this court in the case of Jamieson v. Kings County Elevated Railway Co. (147 N. Y. 322, 325.) Judge Finch there said: "The plaintiff sought

to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity and proving, in each case, what the particular premises owned by the witness rented for before the road was built and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evidence raised a collateral issue (Gouge v. Roberts, 53 N. Y. 619), and left the court to try a dozen issues over as many separate parcels of property. We have held such a mode of proof to be inadmissible. (Huntington v. Attrill, 118 N. Y. 365; Matter of Thompson, 127 N. Y. 463.) The elevated railroad cases in this court, to which the plaintiff refers us, give no warrant for such a mode of proof, but indicate that the general course and current of values must be shown by persons competent to speak, leaving to a cross-examination any inquiry into specific instances if such be deemed essential. Almost all the evidence of depreciation was of the erroneous character, and we cannot say that it may not have worked harm to the defendant."

The rule thus laid down was followed in Witmark v. New York Elevated R. R. Co. (149 N. Y. 393) and other cases.

The course of procedure under this rule may be thus briefly stated: Plaintiff having called as a witness an expert, is permitted to show the general course and current of values in the immediate vicinity, leaving to a cross-examination any inquiry into specific instances if such be deemed essential, the reason for the rule being that to permit evidence of the rental or free value of other premises would raise in each case a collateral issue to be tried.

When the plaintiff's expert witness is cross-examined by the defendant as to specific instances it is competent upon a redirect examination for the plaintiff to make such full inquiry as he may be advised, as to each one of the specific instances brought out on cross-examinations.

In the case at bar the plaintiffs swore their expert and conducted the direct examination in compliance with the rule; on cross-examination the defendants made inquiry as to about twelve pieces of other property in the vicinity of the premises in suit; on redirect examination the plaintiffs examined the witness, over the objection and exception of the defendants in regard to the free or rental value of some sixteen additional pieces of property in the immediate neighborhood.

We are of opinion that the introduction of evidence by the plaintiffs in regard to these additional pieces of property in the immediate neighborhood was in direct violation of the rule we have discussed.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment and order reversed, etc.

BUNNELL v. BUTLER.

23 Conn. 65. (1854)

This was an action upon a promissory note, tried before the Superior Court, at Hartford, at the January term, 1854.

On the trial to the jury, the defendant, under his plea of set off, introduced in evidence, a promissory note, executed by the plaintiff and two others, for the sum of $824.06, payable to the defendant, upon which he claimed more was due him, than he owed the plaintiff, and that he had a right to recover the balance.

The jury having returned their verdict in favor of the plaintiff, the defendant moved for a new trial, claiming that the judge on the circuit erred in his instructions to the jury, upon the subjects of duress and confirmation, and in limiting the number of impeaching witnesses; and the questions of law were reserved for the advice of this court.

WAITE, J. Upon the trial of this case, in the court below, the only defense made, was a right to set off against the plaintiff's demand, a balance claimed to be due upon a certain promissory note.

Now the question, whether the plaintiff was indebted to the defendant, in the manner claimed by him, was distinctly submitted to the jury, and found in favor of the plaintiff, and no complaint is made, that the question was not properly made or fairly submitted. If that question has been correctly determined, then it is immaterial, whether the defendant attempted to set off the note or the original indebtedness. In neither case can his defense prevail.

In the next place, it is claimed that the court erred, in limiting the number of impeaching witnesses. This, however, was a matter within the discretion of the court. It would be absurd to hold that upon an enquiry of that sort, depending, in a great measure, upon the opinion of witnesses, a party has the right to examine as many as he pleases, and that the court and jury are bound to sit and hear them without any power to interfere.

There must necessarily be a limit to such enquiries, and it is for

the court to prescribe it. We are not, however, to be understood as saying, that *in all cases,* the number of impeaching witnesses is to be the same, as that allowed in the present case. Ordinarily that number ought to be deemed sufficient to enable the triers to pass upon the credit of the principal witness. Much, however, will depend upon the circumstances of the case, and the importance of his testimony. If it should appear, that the case would probably turn upon the degree of credit to be given to it, a more extended enquiry, as to his character for truth, might properly be allowed.

On the other hand, if his testimony should be unimportant, having little or no effect upon the merits of the case, but little time ought to be consumed by such an enquiry.

Nor do we mean to say, that if it should be made to appear that in consequence of such an order, a party has manifestly suffered by it, this court will not grant a new trial. But, in the present case, we discover nothing indicating that the discretion of the court was not fairly and properly exercised.

For these reasons we do not advise a new trial.

In this opinion the other judges concurred, except Storrs, J. who tried the cause in the court below, and was disqualified.

New trial not to be granted.

BECKER et al., Assignees v. KOCK, Sheriff, Appellant.

104 N. Y. 394. (1887)

PECKHAM, J. This action was brought by the plaintiffs as assignees for the benefit of creditors of one Exstein, to recover from the defendant the possession of some personal property amounting in value to about $4,000, or in default thereof to recover such value.

The court directed a verdict for the plaintiffs, and if, therefore, there was evidence enough to authorize a submission of the question of fraud to the jury the judgment must be reversed. We think there was, and had it not been for the rule of law adopted by the court below, we suppose that court would have been of the same opinion. That rule was that as the defendant called a witness by whom he attempted to prove the fraud, and as that witness denied it, the defendant was bound by that denial, in the absence of contradiction by

some other witness, even though the jury might think some parts of the evidence of the witness clearly showed its existence.

To show exactly how the question arose and what was decided by the court, some reference must be made to the testimony, although it will be unnecessary to allude to it all.

The assignor, Exstein, was a merchant engaged in a large business in Buffalo. He kept regular books of account in his business, which were produced upon the trial, and he was called as a witness for the defendant and gave evidence in relation to the books and upon other matters.

The court held, in substance, that the books of the witness Exstein showed a *prima facie* case of an indebtedness of the witness in the amounts therein appearing, and to the persons therein mentioned, and the witness said they were correct. He then stated what has already been alluded to as to those entries made on the sixteenth of October, and continued by explaining the facts upon which they were based. This explanation, the court said, was totally uncontradicted by any other witness, and defendant was, therefore, bound by what Exstein said on that subject, for the reason that he could not discredit or impeach him, and must take what he said as, under the circumstances of the case, true.

If that were the true rule, the court was correct in directing a verdict. The General Term, it must be presumed, also took the same view of the case in directing judgment for the plaintiffs, without delivering any written opinion.

The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor, and the defendant, in order to prove its existence, called the very man as a witness whom he alleged was guilty of the fraud. He might well be regarded, therefore, as an adverse witness, whom the party by the exigencies of his case was obliged to call.

With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.

What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwill-

ing man, while those which are unfavorable may be treated by the jury with that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case.

Starkie, one of the ablest and most philosophical of English writers on this branch of the law, in speaking of a reluctant or adverse witness, uses almost the precise language stated and which has been substantially quoted from him. (Starkie on Ev. [9th ed.] m. p. 248.) Sometimes rather loose language has been indulged in to the general effect that a party cannot impeach his own witness, but when an examination is made as to the limits of the rule the result will be found to be that it only prohibits this impeachment in three cases, viz.: (1) the calling of witnesses to impeach the general character of the witness; (2), the proof of prior contradictory statements by him; and (3) a contradiction of the witness by another where the only effect is to impeach and not to give any material evidence upon any issue in the case. (Lawrence v. Barber, 5 Wend. 301-305; People v. Saffor, 5 Den. 112; Thompson v. Blanchard, 4 N. Y. 303-311; Coulter v. Express Co., 56 N. Y. 585; 2 Starke on Ev. (9 Am. ed.), m. p. 244-250; 2 Phil. on Ev. (C. and H. & Ed. notes), m. p. 981, 982, 983 and note 602; 1 Green on Ev.. sec. 442.) In regard to the first class the rule has been stated to rest upon the theory that when a party calls a witness he presents him to the jury as worthy of belief, and to allow him to call witnesses thereafter to impeach his general character as a man would be to permit an experiment to be made upon the jury by producing a person as worthy of belief (whom he knows and has witnesses to prove to be the contrary), and if his evidence be favorable, to get the benefit of it, and if the reverse, to overwhelm it by the impeaching witnesses.

In such a case as this, however, there is no deception. The defendant calls the very man he accuses of the fraud as a witness to prove it and says, in effect, to the jury, that such evidence as the witness gives which tends to show the perpetration of the fraud alleged is forced from him by the exigencies of the case and the surrounding facts which cannot be denied, while that which he gives that looks towards an explanation of the fraud shall give such faith to as under all the facts in the case they may think it entitled to.

As to the second class, in which an impeachment is forbidden, the authorities in England were in conflict, many of the judges thinking it allowable to prove prior contradictory statements by a witness, but the weight of authority was agalnst it, thereby creating the occasion for an interference by the legislature with the law of evidence, which

passed an act permitting just such evidence under certain restrictions. (See C. L. Pro. act of 1854, 17 & 18 Vic., chap. 125, paragraph 22.) The non-admissibility of such evidence in the courts of this state is, of course not open to discussion. It is alluded to only to show the opinion of the English Parliament (in matters of this nature almost exclusively guided by lawyers), upon this question of impeaching one's own witness, and the readiness of that body to alter the law of evidence in the direction of what seemed to it greater opportunity of ascertaining and administering that for which all courts are instituted, viz., truth and justice.

The third of the above classes, where no impeachment is allowed, is plainly set forth in several of the cases and text-books above cited.

It is not admissible, even in the case of a witness called by the other side, to impeach him by proof of prior contradictory statements on immaterial or collateral issues, and there is not much difference in the two cases, and, therefore, no reason why it should be allowed with reference to one's own witness. But all the cases concur in the right of a party to contradict his own witness by calling witnesses to prove a fact (material to the issue) to be otherwise than as sworn to by him, even when the necessary effect is to impeach him.

Why should not the right exist to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness and with the other facts in the case?

It is a good general rule that the credibility of a witness is matter for the jury, and the fewer technical obstructions there are to the practical operation of that rule the better.

We think that the whole evidence of Exstein in this case should have been submitted to the jury for them to pass upon its credibility, and that they were at liberty to believe that portion which tended to show the debts to be fictitious and to disbelieve the explanation, or that they might regard it as sufficient, just as in their judgment intelligently and honestly exercised, they might determine.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur. Judgment reversed.

TEDENS v. SCHUMERS.

112 Ill. 263. (1884)

MR. JUSTICE WALKER delivered the opinion of the court:

This was an action of assumpsit, brought by Schumers, in the Circuit Court of Cook county, against J. H. Tedens and J. Thormahlm. There was filed the general issue, under which a trial was had resulting in a verdict and a judgment against defendants for $1379. The verdict, as returned by the jury was for $2758, but to avoid a new trial plaintiff remitted one-half and took judgment for the balance. On an appeal to the Appellate Court for the First District the judgment was affirmed, and defendants bring the record to this court, and ask a reversal.

On the trial, appellee testified to his theory of the case. Appellants, on the stand, contradicted him, and testified to their version of the matter. In some portions of this evidence they are corroborated by other witnesses. Appellee, to support his testimony, called a number of witnesses to prove his general character for truth and veracity, to which appellants objected, but the court admitted the evidence, and they excepted, and urge its admission as error. Appellee claims this evidence was admissible on the ground that his character for truth and veracity was attacked by being contradicted by other witnesses. This is, we think, a misconception of the rule. As we understand the rule of evidence, a witness cannot call witnesses to support his general character for truth and veracity until it is assailable. Mere contradictions, or different versions by witnesses, do not justify the application of the rule that he may call witnesses to support his character for truth. When witnesses are called who may say his general character is bad, then he may call witnesses in support of his general character. Before he can do so his general character must be attacked. If the practice sanctioned the calling of witnesses to prove general character whenever a witness is contradicted, it would render trials interminable. The greater portion of the time of courts would be liable to be engaged in the attack and support of the character of witnesses. If permitted, each of the contradicting witnesses would have the same right, and not only so, but all of the supporting witnesses on each side contradicting each other would be entitled to the same privilege. It is thus seen that the rule must be limited to cases where witnesses are called to impeach the general character of a witness, otherwise, it, instead of reaching truth by

the verdict, would tend to stifle it under a large number of side issues, calculated to obscure and not to elucidate them. It may be that some courts have made exceptions to the rule, but we are not inclined to adopt them as the rule. Many cases referred to were where the witness was charged with crime by other witnesses, when it was held he might call witnesses to support his character for honesty.

It has never been the practice in this State to permit a witness in support of his character for veracity, to prove that he has been honest in his dealings, or moral and free from vice. It does not follow that because a man deals honestly, and is otherwise moral, he is therefore truthful. Nor is it believed that because a man is not fair in his dealings, or is immoral, he is therefore untruthful. We are aware that some courts have reached and announced conclusions that immorality and unfair dealing establish a want of credibility for truth, and that morality and fairness in his dealings establish his character for veracity. We presume no one would contend that evidence of general good character for truth and veracity would be admissible to disprove a charge of murder, robbery or larceny. In the charge of murder, proof that the accused had borne a good character as a peaceable, orderly and quiet citizen, in a doubtful case might have a strong tendency to exculpate the accused from the charge, and such evidence is admissible in such cases. So in cases on the charge of robbery or larceny, evidence of general character for honesty and uprightness is admissible in doubtful cases, but not good character for truth and veracity or even other traits of character. This evidence was only calculated to confuse the issue and mislead the jury in their finding, and should not have been introduced.

For the errors indicated, the judgment of the Appellate Court is reversed and the cause remanded.

Judgment reversed.

MASSEY v. FARMERS NAT. BANK OF VIRGINIA.

104 Ill. 327. (1882)

MR. JUSTICE SHELDON delivered the opinion of the court:

This was a suit brought by the Farmers' National Bank of Virginia, against Henry C. Massey, Henderson E. Massey, and George W. Laurie, upon a promissory note, purporting to have been executed jointly and severally by the defendants to the bank. Two trials were

had, in which the jury failing to agree, they were discharged. The plaintiff afterward dismissed its suit as to the defendant Laurie, and a third trial was entered upon, on the second day of which, on motion of the plaintiff, the default as to Henry C. Massey was set aside and the suit dismissed as to him, and subsequently a verdict was rendered against Henderson E. Massey for $4982.42, upon which, after overruling a motion for a new trial, judgment was entered, which was affirmed on appeal to the Appellate Court for the Third District, and an appeal taken by Massey to this court. There are various errors assigned.

One Gatton, a witness for plaintiff, testified that some years before, he had seen Henderson E. Massey write, and that it was his impression that the signature of the name of said Massey to the note in question was in his handwriting. After then stating, on cross-examination, that it was six or seven years since he saw Massey write, and that he did not know that "he could pick out his signature in the bank," defendant's counsel handed the witness a paper having written on it the name "H. E. Massey" sixteen times, and asked the witness to point out the genuine signatures, if any were genuine. The court excluded the question, and exception is taken to this. It is urged that this question was proper on cross-examination, for the purpose of testing the knowledge of the witness, and as authority therefor reference is made to 1 Wharton on Evidence, sec. 710, where the author says: "There is little question that a witness may, on cross-examination, be tested by putting to him other writings not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation." Without stopping to inquire as to the general correctness of this observation, and especially where the rule obtains, as in this state, that evidence of the genuineness of handwriting based on comparison of hands, is not admissible, we think that at least with reference to test papers got up for the occasion, as in the present case, there was no error in not allowing the cross-examination proposed. The same author, further on, in sec. 715, remarks: "We have already seen that a party can not make testimony for himself by writing specimens for the instruction of witnesses afterwards to be called, as to his handwriting. By the same reasoning a party cannot be permitted to get up in this way test papers to be used subsequently for comparison of hands." And although the paper here offered was not to be used professedly for comparison of hands, we think its admission for the purpose declared would be alike objectionable. See Griffits v. Ivery, 11 A. & E. 322,

and King v. Donahue, 100 Mass. 155. In the former case, where there was the disallowance of a like course of cross-examination for the purpose of testing the witness' knowledge, Coleridge, J. said: "We must not allow papers which are not evidence in the cause to be let in for any purpose whatever.

Henderson E. Massey was a witness, in his own behalf on the trial, and testified to the non-execution of the note by him. One Beard, called as a witness on the part of the plaintiff, testified that the general reputation of the defendant, Henderson E. Massey, for truth and veracity was very good. Against the objection of defendant's counsel, the court then permitted this question to the witness: "From that reputation would you, or not, in a case where he was personally interested, believe him under oath?" to which the witness made answer: "If Mr. Massey was interested, I would hesitate to believe him." To seven other witnesses, called by the plaintiff, the same questions against defendant's objection, were allowed as the one to the witness Beard, who made substantially the same answer as he did. This is complained of as error. In Frye v. Bank of Illinois, 11 Ill. 369, this court laid down as the rule, that the proper question to be put to a witness called to impeach another is, whether he knows the general reputation of the person sought to be impeached among his neighbors for truth and veracity, and if this question be answered affirmatively, the witness may then be inquired of as to what that reputation is, and whether, from that reputation, he would believe him on oath. This latter inquiry as to belief is the English rule upon the subject which we have adopted. Mr. Greenleaf, after stating the English rule, remarks that in the American courts perhaps the weight of authority is now against permitting the witness to testify as to his own opinions. This is a consideration against extending such rule of inquiry as to the witness' own belief beyond the limit for which it has the sanction of authority. This mode of impeachment is confined to general reputation. Evidence is not admitted of particular facts, and the opinion allowed to be expressed is to be based solely on general reputation, and not on particular facts. The opinions which were permitted to be given in the present case were not founded upon general reputation alone, but upon general reputation, and interest in the case. Now, the effect of interest upon the credibility of testimony is solely for the consideration and judgment of the jury, and no witness should be allowed to pronounce upon it. The naked question, whether, from defendant's interest in the case, the witness would believe him on oath, no one would pretend to justify.

There would be the same objection, though less in degree, to such an inquiry, based upon general reputation for truth, and interest in the case. Both questions would be improper, as calling for an expression of opinion as to the effect of personal interest upon the credibility of testimony,—in the one case, as to the effect of interest alone; in the other, as to its effect in conjunction with another discrediting circumstance. There should not be given the opinions of witnesses upon the discrediting effect of interest, in whole or in part, upon testimony. Here, the question laid down by the books as the proper one in such case, whether, from the defendant's general reputation for truth and veracity, the witness would believe defendant on oath, was not put; but the question put was whether, from such reputation they would so believe him in a case where he was personally interested, asking an opinion based in part on interest. The question has not the warrant of authority, and was improper.

To what extent the consideration of personal interest influenced the opinions expressed, we have no means of knowing. The form of the answer, "if Mr. Massey was interested," etc., would indicate that defendant's interest in the case had controlling force. We cannot say defendant was not prejudiced by the improper question put, and that the answer would not have been different and less unfavorable for the defendant had the proper question been asked. The credibility of defendant as a witness was a vital matter. Other witnesses testified as to their opinions of defendant's signature from having seen him write. Defendant knew whether the signature was his own or not, and testified from actual knowledge. Improper testimony, unfavorable to his credibility, was calculated to do him great harm. Where a party gives testimony in his own cause, the admitting of many witnesses to give their opinions in any respect as to the effect of his personal interest in diminishing his credibility, is placing such testimony under an unfair disadvantage. We hold that there was error in the allowance of the question.

For the error indicated, the judgment must be reversed, and the cause remanded.

Judgment reversed.

STOLP v. BLAIR.

68 Ill. 541. (1873)

MR. JUSTICE SHELDON delivered the opinion of the court:

This was an action of assumpsit, brought by Blair against Stolp, to recover $500, money alleged to have been loaned by the former to the latter. The plaintiff below recovered, and the defendant appealed.

Three certain rulings of the court below in the admission of evidence are assigned for error, as also that the verdict was contrary to the evidence.

The other ruling excepted to was, in the admission of the following testimony of the witness Bailes: "I borrowed $10 of Blair; am not positive about date, but think it was on Friday of that week (of Sept. 18th 1871). I spoke of giving a note for the money I borrowed, and Blair said: 'I loaned $500 to Mr. Stolp, and did not take a note; I would not think of taking a note of you for $10.'"

The witness further stated, Blair said he let Henry Stolp have $500. The 18th of September, the day of the alleged loan, was Monday. It is contended by appellee's counsel that this statement of Blair, of his loan of $500 to Stolp, was properly admitted as rebutting testimony to sustain Blair, after the defendant below had attempted to impair the credibility of Blair on cross-examination, and by testimony contradicting him.

This court, in Gates v. The People, 14 Ill. 434, recognized the existence of a conflict of authority upon the question whether the former declarations of a witness, whose credibility is attacked, may be given in evidence to corroborate his testimony, but did not find it necessary in that case to determine in regard to the general rule, as that case came within one of the admitted exceptions to the rule of exclusion.

We find the decided weight of authority to be, that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited; and we are satisfied with the correctness of the rule. The following may be referred to among the authorities sustaining such rule: 2 Phil. Ev. 5th ed. 973; marginal; 1 Stark. Ev. 147; 1 Greenl. Ev. sec. 469; Robb et al. v. Hackley et al. 23 Wend. 50; Gibbs v. Tinsley, 13 Verm. 208; Ellicott v. Pearl, 10 Pet. 412; Conrad v. Griffey, 11 How.

480. A collection of cases upon the subject, on either side, will be found in the notes to 2 Phillipps, by Cowen & Hill, 979, marginal, and in the case cited from 11 Howard.

In some places, as in England and New York, the rule has been adopted in the place of a prior contrary one. As recognized in Gates v. The People, *supra,* the authorities agree that the former statements of the witness may, in some instances be introduced for the purpose of sustaining his testimony; as, where he is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts. So, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account before its effect and operation could be foreseen. In some cases the admission of the confirmatory statement has been confined to the sole case of an impeachment by a contradictory statement of the witness; and again, such confirmatory statements have been held to be especially not admissible, if they were made subsequent to the contradictions proved on the other side as in Ellicott v. Pearl, *supra,* and Conrad v. Griffey, *supra.*

In the case under consideration, there were no contradictory statements of Blair introduced in evidence. There was nothing further in the way of impeachment than that it was sought to impeach him on cross-examination, and that there was contradictory testimony to his in the case. The statement of Blair which was admitted, does not come within any of the admitted exceptions to the general rule of inadmissibility. It was her mere declaration of the fact made not under oath, which was not evidence. We are of opinion that, on principle and authority, it was not competent, and was wrongly received. As we find this a sufficient ground for reversal, we will express no opinion upon the weight of the evidence.

The judgment is reversed and the cause remanded.

Judgment reversed.

C. R. I. & P. R. R. CO. v. BELL, Admr.

70 Ill. 102. (1873)

MR. JUSTICE SHELDON delivered the opinion of the court:

The plaintiff in the court below commenced two actions against the railroad company, founded upon a collision between a train on the defendant's railroad and the wagon and team of John Boyd, deceased, the plaintiff's intestate, at a highway crossing near Minooka, in Grundy county. One action was for damages sustained by the death of Boyd, and the other for damages resulting from the killing of his horses and the destruction of his wagon and harness.

The declaration alleged, as the negligence of the defendant which caused the collision, an omission to ring the bell or blow the whistle for a distance of 80 rods before reaching the crossing, as required by statute. The cases were consolidated.

Verdicts and judgments were rendered in favor of the plaintiff in both cases, and the defendant has appealed.

It is urged that the court erred in excluding the testimony of witnesses as to what Meade, one of the plaintiff's witnesses, said, at the time of the accident, in regard to Boyd's habit of going home intoxicated.

The testimony was not admissible for the purpose of impeaching Meade, as he had given no evidence upon that subject. It is true, he was asked, on cross-examination, whether he had not made such a statement, and denied it. But the question was incompetent, as it was not relevant to any testimony which the witness had given, and his answer, it being as to a collateral matter, had to be taken as conclusive. It was not admissible afterward to contradict him in that respect, and thus introduce into the case his unsworn statements. If the defendant sought any statement of Meade upon that subject, it should have examined him as a witness, and got his sworn statement.

It is insisted that the court below erred in excluding evidence of what were the personal habits of the deceased when intoxicated. The inquiry was general, without any specifications of the sort of habits sought to be proved.

We think the court was justified in rejecting the offered testimony, without some particularizing of the habits offered to be proved, so that it might be seen that they were such as that the proof of them would have a legitimate bearing upon the issue.

It is insisted that the verdict was manifestly against the evidence and the instructions of the court.

We are of opinion that the verdict was manifestly against the evidence, and that the judgment should be reversed.

Judgment reversed.

HILL v. MONTGOMERY.

184 Ill. 220. (1900)

MR. JUSTICE CRAIG delivered the opinion of the court:

At the May term, 1895, of the Circuit Court of Vermilion county one John Montgomery was convicted of grand larceny and sentenced to the penitentiary. Mary A. Montgomery, his wife, the appellee, employed appellant a practicing attorney at the Vermilion county bar, to obtain for her a divorce from Montgomery on ground that he had been convicted of a felony. On September 15, 1896, Hill filed a bill on her behalf for divorce. Summons was issued and served on Montgomery, and at the October term, 1896, a default was entered against him. At the October term, 1896, the cause was continued for evidence, and at the January term, 1897, was dismissed for want of prosecution, at the cost of the complainant therein. On January 5, 1899, Mary A. Montgomery brought suit against appellant, Hill, for $10,000 damages, claiming that he had willfully, maliciously, fraudulently and falsely represented to her that she had been granted a divorce from Montgomery, and, acting under such representations and believing them to be true, she entered into marriage with one John Hampton, and continued to live with Hampton as his wife until December 30, 1898, when she learned that she had not been divorced from Montgomery, whereby her good name and reputation were damaged and she was brought into public scandal and disgrace. Defendant pleaded the general issue. The cause was tried by a jury, resulting in a verdict of guilty and fixing appellee's damages at $5,000. On appeal the judgment was affirmed in the Appellate Court.

The facts in the case have been settled adversely to appellant by the judgment of the Appellate Court, and that judgment, as to controverted facts, must be regarded as final on this appeal. It therefore only remains to be determined whether the Circuit Court erred, on the trial, in its ruling on questions of law.

In the argument of counsel for the appellant three grounds are relied upon to reverse the judgment: First, the court erred in refusing to admit certain evidence offered by the appellant; second, the court made improper remarks in the hearing of the jury during the progress of the trial; and third, the court gave improper instructions on behalf of the plaintiff.

Under the first point relied upon, the cross-examination of the plaintiff appellant undertook to prove by her that she first became acquainted with John Hampton, the person to whom she was married, in a house of prostitution in Danville. The object of this evidence was to prove that the character of the plaintiff for chastity was bad. It may be conceded that in an action of this kind, brought to recover damages sustained by the plaintiff to her good name and character, it was competent, in mitigation of damages, to prove the character of the plaintiff, and if appellant had offered competent evidence to establish that fact it might have been admitted. But appellant undertook to make proof of bad character on cross-examination of the plaintiff, and the court held that the evidence thus offered was incompetent on cross-examination. The court did not hold that appellant could not prove the fact at the proper time, but merely ruled, and so stated at the time, that the evidence was not admissible on cross-examination. If the plaintiff, on her direct examination, had given evidence in reference to her character, then, of course, the appellant would have been entitled to cross-examine her fully on this subject. But such was not the case. The plaintiff, on her direct examination, was asked nothing and said nothing in regard to her character, and it was proper to confine the cross-examination to facts called out in chief.

Under the third head relied upon, it is claimed that the court erred in giving instructions 4 and 5 for plaintiff. Instruction No. 4 given for the plaintiff was as follows:

"The court instructs the jury that one of the modes recognized by law for impeaching the veracity of a witness is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached, in the neighborhood where he resides; and if the jury believe, from the evidence in this case, that the reputation for truth and veracity of any party or witness who has testified before you, in the neighborhood where he resides, is bad, then the jury have a right to disregard the whole of such person's testimony and treat it as

untrue, except so far as it is corroborated by other credible evidence or by facts and circumstances proved on the trial."

The fifth instruction directed the jury that if they believed, "from the preponderance of the evidence, that the general reputation for truth and veracity of any person who testified upon the trial of the cause has been successfully impeached, or that any witness has willfully sworn falsely as to any matter or thing material to the issues of this case, then the jury are at liberty to disregard the entire testimony of any such witness, except in so far as the same has been corroborated by other credible evidence, or by facts and circumstances proved upon the trial of this cause."

We think the law is well settled that where the general reputation of a witness for truth and veracity is bad in the neighborhood where he resides, the jury may disregard his evidence, except so far as it is corroborated by other evidence or by the facts and circumstances proven on the trial,—and this is the substance of the fourth instruction. The fifth instruction announces the same principle, with the addition that if any witness has willfully sworn falsely as to any matter or thing material to the issue. The instructions are, in our opinion, sustained by Freeman v. Easly, 117 Ill. 317, Hirschman v. People, 101 id. 568, and Miller v. People, 39 id. 457. In the last case cited an instruction in substantially the same language as No. 5 was considered and sustained. Indeed, the sixth instruction given at the request of appellant announces the same rule contained in the two instructions complained of in the argument.

Affirmed.

THE PEOPLE v. COLE.

43 N. Y. 508. (1871)

Error to the late General Term of the Supreme Court in the fifth district, to review the reversal by that court of a conviction of the defendant in error of grand larceny at the Jefferson County Sessions, on the 15th of September, 1869.

The prisoner was charged with stealing from the prosecutor, Adams, a government bond for $500. The bond was in a bureau drawer, in the house of Adams, and was taken while he was out of the house milking the cow. It appeared that the wife of Adams was

present when the bond was taken. Mrs. Adams swore on her direct examination that the prisoner, while her husband was out milking, came into the dining room where the bond was, and said she must let him have it. That she told him she could not, and that, if he wanted it, he must ask her husband, that it was not hers. That the prisoner then said that the husband would not let him have it, if he asked him; that he must have it, and that unless she gave him the bond he would tell her husband of their improper intimacy. That thereupon she "got the bond out of a drawer, in a box in a morocco case, and laid it on the bureau, and the prisoner took it and carried it away with him.

The witness, at the close of her direct examination, was taken with fainting fits, and soon went into convulsions. It was conceded that during the whole of the remaining part of the trial she was entirely unfit to be cross-examined.

The prisoner's counsel called on the district attorney to produce her for cross-examination, and moved that her evidence be stricken out, asked a postponement of the trial until she should recover, and asked that the prisoner be discharged. All these requests were denied by the court, and he permitted the evidence given by Mrs. Adams to be submitted to the jury. The prisoner declined to give any evidence, and moved for his discharge, on the ground that there was not sufficient legal evidence to convict him. He also requested a charge that in the absence of evidence of improper intercourse between him and Mrs. Adams, there was no proof sufficient to constitute larceny. This was refused by the court.

The prisoner was convicted and sentenced to State prison for five years.

GROVER, J. The evidence was ample to submit to the jury, for them to determine whether the prisoner, at the time he took the bond, did not know that such taking was against the will of Mr. Adams, the owner, and with the fraudulent intent to deprive him of his property, with instructions, that in case they found the affirmative of these facts, they should find the defendant guilty, notwithstanding the consent of the wife to such taking. It will be seen that I should have found no difficulty in sustaining the conviction in the present case, had not the witness, Mrs. Adams, been sworn at all. The other evidence was ample, if believed by the jury, to authorize the conviction, but this does not relieve the case from difficulty. Mrs. Adams was sworn and examined in chief, and upon such examination gave material evidence against the prisoner and before the

prisoner had had any opportunity for cross-examination became so severely ill as to render her cross-examination impossible. This evidence against the exception of the prisoner was submitted to the consideration of the jury. This evidence may have injured the prisoner; and if incompetent against him, his request that it should be struck out and withdrawn from the jury should have been complied with. The question presented is of rare occurrence, upon which there has been but little judicial authority. The only case in this State involving the question is that of Kissam v. Forest (25 Wendell, 651). In this case, upon trial before referees, at the close of the direct examination of a witness, the referees proposed an adjournment, to which the parties consented. Before the adjournment day the witness died. The referees disregarded the testimony, and the Supreme Court affirmed the judgment. The rule at common-law was discussed, and the authorities examined, and the conclusion arrived at that the rule was that no evidence should be admitted but what was or might be under the examination of both parties. That this was the common law rule is shown from the authorities cited; and the reason upon which it was founded was that *ex parte* statements were too uncertain and unreliable to be considered in the investigation of controverted facts, and should not therefore be received as evidence. The rule of the civil law is different. In those countries where the latter system prevails, the testimony of witnesses is often taken in secret, and the party to be affected thereby is often kept in ignorance of what it is until too late to controvert it by counter testimony. The great superiority of the common-law rule is obvious, and that should be adhered to, although in some cases there may be an apparent hardship. No injustice is done to the party seeking to avail himself of the evidence to require, that, before its admission, its truth shall be subjected to such tests as the experience of the ages has shown were necessary to render reliance thereon at all safe, and where this has been prevented without any fault of the adverse party, to exclude the evidence. Forest v. Kissam (*supra*) was reversed by the court for the Correction of Errors. (7 Hill, 463.) In the latter court, the chancellor and two senators gave opinions to the effect that the testimony ought to be considered for what it was worth, although there had been no opportunity for cross-examination, the witness and the party introducing him being wholly free from fault. Some senators gave opinions for reversal, upon the ground that the party, by consenting to the adjournment at the close of the direct, had waived the right of cross-examination. Under these circum-

stances, it is impossible to determine upon what ground the reversal was placed by the majority of the court, and the case is consequently no authority. The chancellor cites some cases, showing that in chancery the direct examination has been received where there has been no opportunity to cross-examine. The rule in chancery is entitled to but little weight upon the inquiry as to what it is at common-law, for the reason that the practice and rules in chancery were to a great extent derived, not from the common, but from the civil law. The mode of examination of witnesses in chancery was entirely different from that at common-law. My conclusion is, that, both upon principle and authority, the testimony of Mrs. Adams was incompetent.

Reversal affirmed.

THE PEOPLE v. DARR.

262 Ill. 202. (1914)

MR. JUSTICE VICKERS delivered the opinion of the court:

Samuel F. Darr and Harvey Austin Six, the plaintiffs in error together with Louis Wood Hill and John Doe, were indicted at the September term of the Circuit Court of Peoria county, 1911, for a conspiracy to obtain money and property from the German Fire Insurance Company of Peoria by means of false pretenses. Darr and Six were jointly tried at the January term, 1912, of the Circuit Court and found guilty and each of them was sentenced to the penitentiary for a term of three years. A writ of error was sued out by them from the Appellate Court for the Second District, and that court having affirmed the conviction the record has been brought to this court for review by writ of error.

Complaint is made that plaintiff in error, Six, was asked about certain fires that had occurred in Springfield, one of which was a store owned by the wife of Six. These questions were asked Six on his cross-examination. The point is made that the effect of asking these questions was to insinuate that there had been something crooked in connection with these fires, and to arouse a possible suspicion in the minds of the jury that Six was in some way responsible for such fires. It is not pretended by the defendant in error that any of the fires in Springfield had any connection whatever with the burning of the Aldine Hotel, in Peoria. Some of them apparently

occurred several years before the burning of the Peoria property. This cross-examination was improper. It was not germane to anything that had been testified to by Six in chief. Six, however, in answer to these interrogatories, disclaimed any interest in any of the fires referred to, denied that he had any property destroyed in any of them or that he ever collected any insurance as the result of such fires, and his answers were not improper, still, in view of the answers given by the witness, we cannot believe that the jury were misled or otherwise unfavorably influenced against plaintiffs in error by reason of this testimony. We think the admission of this evidence was harmless.

There being no reversible error in this record, the judgment of the Circuit Court of Peoria county is affirmed.

Judgment affirmed.

DEHAVEN v. DEHAVEN.

77 Ind. 236. (1881)

ELLIOTT, C. J. Nancy A. DeHaven and Christopher DeHaven, her husband, instituted this action against the appellants, Jacob DeHaven and James T. DeHaven, and five others.

The issue made by the pleadings in this case was, whether Nancy DeHaven was an heir of Isaac DeHaven, deceased, and as such entitled to a distributive portion of his estate.

The appellants ask a reversal upon the ground that a new trial was erroneously denied them. The questions argued by counsel all arise upon the rulings admitting and excluding testimony.

The appellants upon cross-examination asked the witness, Tyner, the following question: "State whether or not, during the earlier and later period of his life, you heard him, Isaac DeHaven, make any other statements or expressions in regard to the parentage of Betsy, other than you have given upon your original examination?" The declarations of Isaac DeHaven, the ancestor, were called out upon appellee's direct examination for the purpose of proving the parentage of her mother, and were properly admitted for declarations concerning pedigree constitute a marked and important exception to the rule excluding hearsay evidence. The declarations are admitted upon the theory that they tend to show that the person to whom they refer

was recognized and treated as one of a family. The statements of an ancestor or deceased kinsman are not to be regarded as separate and distinct conversations, constituting in themselves independent subjects of investigation, but they are to be taken as a connected and indivisible thing indicating the treatment of the person whose pedigree is in dispute. The acts and declarations of the deceased kinsman are an entirety, and the question is, not simply what he said or did on one day, or within one week, but what was his general line of conduct. The subject-matter which the appellee by her direct examination laid open for investigation, was the manner of the deceased kinsman's treatment of her mother, and not simply what such kinsman said or did on this or that particular day. In entering upon this general subject, the appellee opened for examination a wide field, that of the general conduct of such deceased ancestor, and did not merely expose a spot here and there as particular days or instances were selected by her counsel. The qustion was proper, and the court erred in refusing to permit it to be answered.

It is true, as appellee's counsel assert, that the English rule respecting cross-examinations has been modified by the courts of this country, and that a cross-examination must, under the American rule, be confined to the subject-matter of the examination in chief. Subject-matter is not, however, to be given such a narrow and restricted meaning as that ascribed to it by counsel. Facts and circumstances connected with the subject may be asked for and called out upon cross-examination, and the cross-examining party cannot be restricted to mere parts of a general and continuous subject which constitute a unity.

Judgment reversed.

PEOPLE v. ROBINSON.

135 Mich. 511; 98 N. W. 805. (1905)

HOOKER, J. The defendant was convicted of violating the law prohibiting the sale of spirituous and intoxicating liquor, known as the "Local Option Law," which is in force in this country, and the case is before us on exceptions before sentence.

A witness called by the people testified on cross-examination that he had bought liquor of respondent for medicinal purposes, had seen

his name registered, and had never seen anything out of character at respondents' store. On redirect he was asked "what difficulty he bought medicine for," and stated that he could not tell, and that it was well known that he took daily drinks. On his direct he was asked questions relating to the administering the oath to respondent when he verified the reports. The redirect examination complained of was in response to new matter drawn out on the cross-examination, and was competent.

Conviction affirmed.

STRUTH v. DECKER.

100 Md. 368, 59 Atl. 727. (1905)

PEARCE, J., delivered the opinion of the court:

This is an appeal from rulings of the Court of Common Pleas of Baltimore City in the trial of a caveat to the will of Charles Struth, deceased. Six issues were sent by the Orphans' Court to be tried by a jury. The first related to the signing and attestation of the paper offered for probate; the second, to the question of testamentary capacity; the third, to knowledge of the contents of the paper; the fourth, inquired whether any part of said paper was contrary to the testator's instructions; the fifth, whether any part of said paper was misunderstood by him at the time of execution; and the sixth, whether its execution was procured by undue influence exercised over him. The jury answered "yes" to the 1st, 2nd and 3rd issue, and "no" to the 4th, 5th and 6th, the verdict being for the caveatees on all the issues.

Upon cross-examination, Dr. Street, after stating that he had heard the will read, was asked this question:

"Now Doctor, if it should turn out in the proof that every piece of property he owned was mentioned in this will, and that all his beneficiaries are mentioned in this will, and that he has charged certain ones with advancements, and that he has made certain provisions in regard to certain stock mentioned therein, and that all this originated with him, himself, and without any knowledge on the part of counsel, do you mean to say that such a man as that was incapable of making a valid deed or contract?" This was objected to, and the second exception was taken to its allowance. This question may not be framed with strict regard to the usual form of hypothetical ques-

tions, but it is clearly proper cross-examination, and the refusal of the question would have been hypercritical.

The fifth exception was taken to the allowance of the following question to Mr. Decker, the attorney who drew the will: "What was his mental condition the day you drew the will as compared with his mind as you knew him before?" It is contended that this asks for *mere opinion,* from one who is neither an expert, nor a subscribing witness, and was therefore improper. But Mr. Decker had known Mr. Struth for fifteen years, had been accustomed to meet him socially at the Germania Maennorchor where he frequently played cards with him, and had transacted one piece of business with him three or four years before, and we think he had the opportunity to form a rational opinion and that the facts deposed to by him in his testimony did furnish a rational ground for making the comparison sought in the question. The Berry will Case, 93 Md. 580.

Dr. Street was called in rebuttal by the caveators, and after reciting to him portions of Mr. Decker's testimony as to the dictation of the will to him by Mr. Struth; and his own previous ignorance of the testator's property, and its intended disposition, he was asked "with this additional knowledge what he had to say as to Mr. Struth's capacity to make the will in question," and the tenth exception was taken to the refusal of this question.

We cannot perceive that this tended to rebut anything brought out in Mr. Decker's testimony, and if intended to reply to the hypothetical question and answer to Dr. Street which was the subject of the second exception, the witness should have been re-examined upon the conclusion of the cross-examination, and not called in rebuttal.

It follows that the ruling appealed from must be affirmed.

Rulings affirmed and cause remanded.

GRABOWSKI v. STATE.

126 Wis. 447; 105 N. W. 805. (1905)

CASSODAY, C. J. The plaintiff in error was convicted of having, on December 14, 1904, taken improper and indecent liberties with the person of one Franceska Heine, a female person of the age of about ten years, of Polish parentage, contrary to the statute, and was sen-

tenced to imprisonment in the house of correction for the term of two years.

Error is assigned because the court admitted testimony of the little girl as to the accused taking indecent liberties with her person a short time prior to the time in question. Such evidence was clearly admissible, as tending to prove the motive and intent of the accused in doing the acts complained of. Benedict v. State, 14 Wis. 423; Proper v. State, 85 Wis. 615, 628-631, 51 N. W. 1035; Lanphere v. State, 114 Wis. 193, 200, 201, 89 N. W. 128; Bannen v. State, 115 Wis. 317, 330, 331, 91 N. W. 107, 965; 4 Elliott, Evidence, sec. 2720, and cases cited there. So there was no error in allowing the little girl, on redirect examination, to testify to the effect that the reason why she told the accused that what she had said about his committing the offense was all a lie was because she was afraid he would kill her. On rebuttal a witness for the state was asked what conduct or language he saw and heard between the accused and his wife when he went to the saloon at the time in question. In overruling the objection to the question the court said: "It is only relevant by reason of the testimony given by the defendant on this subject." Having opened the door for the admission of such testimony the accused is in no position to take exception thereto. Schissler v. State, 122 Wis. 365, 372, 373, 99 N. W. 593. Counsel contends that it was only on cross-examination of the accused that such testimony was adduced. But in the direct examination of the accused he testified as to what took place between him and his wife back of the bar in the saloon after his wife and the little girl came downstairs. The state, on rebuttal, sought to prove by a physician that he had examined the wife of the accused, and what he had examined her for. On objection being made, the district attorney insisted that the testimony was proper as impeaching the accused in swearing "that he had not abused his wife," and thereupon the objection was sustained. Such ruling was in favor of the accused. We perceive no ground of criticism in such remarks of the district attorney.

By the Court. The judgment of the Municipal Court of Milwaukee county is affirmed.

RIGGS v. STERLING.

60 Mich. 644. (1886)

Ejectment. Plaintiff brings error. Affirmed.

SHERWOOD, J. The action in this case is ejectment, to recover the possession of less than forty acres of land situate in the county of Wayne and not included in any town plat, city, or village. It was purchased by William Sterling, the husband of the defendant, in 1874, and was used and occupied by them as their homestead until the sixth day of March, 1883, when the husband died, and the defendant has made the same her home, continuing the occupancy thereof by herself and tenants up to the time of commencing this suit.

The value of this homestead was really the only question to be determined in this case. Six witnesses on each side were allowed to testify upon the subject and no more. The refusal to allow more to testify on the part of the plaintiff is assigned as error; but we think there was no abuse of discretion on the part of the court in not allowing more cumulative evidence upon this point. Under the circumstances of this case, I can see no reason why a larger number than composed the panel of jurors to try the cause should have been necessary.

KRAIMER v. STATE.

117 Wis. 350. (1903)

WINSLOW, J. Douglas Kraimer was convicted in the Circuit Court for Price county of an assault upon one Peter Isaacson, being armed with a dangerous weapon and with intent to kill and murder said Isaacson, and he brings his writ of error to reverse the judgment.

The plaintiff in error was asked upon cross-examination whether he had ever been convicted of a crime, and replied that he was convicted of stealing a horse in Indiana, and sent to prison for eighteen months. Afterwards, in the trial, the plaintiff in error called as a witness one Peter Smith, who lived in the vicinity and knew the accused well, and asked him whether he knew Kraimer's reputation for truth and veracity in the community where he lived, and upon objection the testimony was ruled out on the ground that the repu-

tation of the accused had not been attacked. It is very plain that this ruling was erroneous, and equally plain that the error was prejudicial. Our statute allows the fact of the former conviction of a witness for a criminal offense to be proven by cross-examination of the witness himself; but such fact is only allowed to be proven to affect the credibility of the witness, or, in other words to impeach him. Sec. 4073, Stats. 1898. It is simply a method of impeaching the character of the witness for truth and veracity. The rule is well settled that when a witness is impeached, whether by the evidence of witnesses who testify to his reputation for truth and veracity, or by proof of a former conviction of crime, it is competent to introduce witnesses to testify to his good character in that respect. 3 Jones, Evidence, Sec. 870; Gertz v. Fitchburg, R. Co., 137 Mass. 77.

By the Court. Judgment reversed, and action remanded for a new trial.

WARFIELD v. RAILROAD.

104 Tenn. 74. (1900)

WILKES, J. These actions were for unlawfully ejecting the plaintiff from the cars of the defendant road.

They were tried together in the court below and in this court, and there was verdict and judgment in each case in the trial court for the railroad, and the plaintiffs have appealed and assigned errors.

It is said it was error to allow evidence to sustain the general character of the witness, Corbett, the conductor on the train. This witness was assailed in a severe and searching cross-examination by questions which, in their substance and manner of asking, were calculated to impeach his veracity and question his truthfulness. Under such circumstances it was proper to allow evidence to sustain his character. Richmond v. Richmond, 10 Yer. 343-5.

Upon the whole record we have not been able to find any reversible error, and the judgment of the court below is affirmed with costs.

SHIELDS v. CONWAY.

133 Ky. 35. (1909)

Opinion of the court by JUDGE CARROL. Affirming.

Appellee, who was plaintiff below, brought this action in slander against the appellant, Shields, who was defendant below, charging that in the presence and hearing of divers and sundry persons Shields falsely and maliciously spoke of and concerning him the following words, to-wit: "Oh, yes; you are paving the way to have another lawsuit with me, so you can go down to Bardstown and swear to some more damned lies like you did on the other trial."—thereby meaning to charge Conway with the crime of perjury committed in his testimony in a case pending between the parties a short time previously. The answer did not deny the fact that Conway had previously testified in the suit, but did deny speaking the words charged. Upon trial before a jury the plaintiff recovered a judgment for $400.

On the trial of the case, after a witness named Barnett testified in behalf of plaintiff, the defendant introduced a record of the Nelson Circuit Court, consisting of an indictment against Barnett and a judgment, showing that in 1887 on the charge of murder he was convicted and his punishment fixed at eighteen years in the State penitentiary. Thereupon the plaintiff introduced in rebuttal a number of witnesses, who testified to the general good reputation of Barnett for truth and morality. The admission of this evidence is the principal error complained of. It is the contention of appellant that this evidence was incompetent because the general reputation of Barnett was not attacked or impeached by the introduction of the record of his conviction. Section 597 of the Civil Code of Practice declares that: "A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony." And section 599 provides: "Evidence of the good character of a witness is inadmissible until his general reputation has been impeached.' Under section 597 it was competent for the defendant to introduce the record of Barnett's conviction, but the admissibility of the evidence of his good character depends upon the

question whether or not the introduction of this record was such an impeachment of his general reputation, within the meaning of section 599, as authorized the introduction of evidence of his good character. This precise question has not heretofore been decided by this court, but it has come before other courts of last resort—some of them holding that evidence of this character is competent, and others holding it incompetent.

In our opinion the evidence was competent. The purpose in introducing the record of conviction was to impeach the general reputation of the witness, and to impress the jury with the fact that he was not worthy of belief. However serious an offense a man may have committed, and however damaging to his reputation it may be, he should be allowed the privilege of outliving the odium attached to it, and reinstating himself in the confidence and respect of his neighbors and acquaintances. No matter how bad a man may have been, or how low in the estimation of his neighbors he may have fallen, he should not be denied the right to reform or the high privilege of becoming an honored and useful citizen; and when he does so reestablish himself, and the record of his former delinquency is offered to discredit him, he should have the right to show that his reformation is genuine, and that his neighbors and acquaintances regard his general reputation for truthfulness and morality as good. It would be a hard and almost cruel rule to lay down that a man on the witness stand might be confronted with the record of a crime, committed many years before, offered for the purpose of embarrassing, humiliating and discrediting him, and yet denied the right to show by persons competent and qualified to speak that afterwards by good conduct and an upright life he had established himself in the respect of his neighbors. We think this conclusion fully authorized by a fair construction of the Code provisions referred to. A witness may not be impeached by evidence of particular wrongful acts, with the exception that it may be shown that he has been convicted of a felony. Although he may have committed a dozen particular wrongful acts, each involving greater moral turpitude than many felonies, yet evidence of them is not competent; but if he has committed one amounting to a felony, followed by a conviction, this one offense may be offered in evidence against him. It is therefore manifest that the Legislature intended to place the one act followed by a conviction for a felony in a class different from other wrongful acts not so punished, and in the same category as an attack upon the general reputation of the witness. A witness cannot be impeached by evi-

dence of particular wrongful acts, because he may not be prepared to meet them; and, if he was, to allow an explanation for each, would often unreasonably protract the trial, besides bringing into it many side issues. And, as the witness cannot be impeached by evidence of particular wrongful acts, neither can evidence be offered to sustain his character, as such evidence is not admissible until his good character has been put in issue—until an attack has been made upon it in a general way. But a witness may be impeached by a record of conviction for a felony, and, as he cannot excuse or justify its commission or go behind the judgment, it would follow that if there was no other way by which he could show the jury or the court that he was truthful and moral, he must stand mute before the silent but impressive evidence of his guilt, and see his reputation attacked without an opportunity to defend. Although a witness when thus impeached may not go behind or explain the conviction, yet he may show that since the judgment was pronounced he has lived an honorable and upright life, and is held in high esteem by friends and neighbors; and this, upon the ground that the evidence of conviction is in fact and truth an attack upon his general reputation within the fair meaning of the Code.

But counsel say that, if it is allowable to offer evidence of good character to rebut the presumption of unworthiness arising from a conviction for a felony, it would logically result in allowing a witness who had made contradictory statements or declarations in conflict with his present testimony, or who was shown to have an interest in the case, to introduce evidence in support of his good character. There is no reason, however, for carrying the rule we have announced to this extent. A witness may be related to the party in whose behalf he is testifying, or he may be interested in the result of the controversy, or he may have made contradictory statements, or declarations in conflict with his present testimony, but evidence of these facts, or any or all of them would not be an impeachment of the general reputation of the witness for morality and truth. A witness of the highest character may be related to a party to the litigation, or interested in the result of the trial, or have made statements contradictory of his evidence, but these circumstances do not involve his general reputation for truthfulness, nor are they regarded as impeaching his character. We have carefully examined the instruction criticized, but we do not find it open to the objection urged against it.

Perceiving no error, the judgment is affirmed.

YORK v. PEASE.

68 Mass. 282. (1854)

Action of tort, brought by an infant, by Dr. Simeon D. York, his father and next friend, for slander, in charging the plaintiff with larceny by the following words: "The trouble was instigated by Dr. York. I discharged his boy for being dishonest, for stealing. He stole money from me, and I turned him away." Answer, that the words "were true, and spoken for justifiable ends."

BIGELOW, J. 1. The plaintiff, in proving his *prima facie* case, offered evidence to show that the words alleged to be slanderous were not spoken under circumstances which would bring them within the rule touching privileged communications. He was not bound to do this; but in the exercise of his own discretion, he saw fit thus far to anticipate the defense. Having thus opened this part of the case, and introduced as much evidence respecting it as he deemed expedient, he could not afterwards claim, as a matter of right, to accumulate testimony upon the same point. It was then a mere matter of discretion, with the judge who presided at the trial, to admit or reject the evidence, to the exercise of which no exception can be taken. 1 Greenl. Ev. sec. 74, and 431. Browne v. Murray, Ry. & Mood. 254. As a general rule in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defense, he should not afterwards be allowed to offer evidence on the same point, in reply to the case made by the testimony of the defendant. To permit a party thus to divide his case leads to confusion, and gives him an unfair advantage over his adversary.

2. When, and under what circumstances, a party may be allowed to put leading questions to his own witness, is also a matter of discretion, resting solely with the judge before whom the trial is had, and is not subject to revision or exception. Moody v. Rowell, 17 Pick. 498. 1 Greenl. Ev. sec. 435. The questions put to the *prochein ami* by the defendant come clearly within this rule.

Exceptions overruled.

THE STATE v. PFEFFERLE.

36 Kan. 90. (1886)

Prosecution for a violation of the prohibitory liquor law. The defendant, Pfefferle, and another, jointly charged in an information containing five counts, were jointly tried at the June Term, 1886, and were found guilty on all the counts. Pfefferle was sentenced on each count to pay a fine of $100, to be imprisoned for thirty days in the county jail, and to pay the costs of the prosecution, taxed at $213.25.

The opinion of the court was delivered by

JOHNSTON, J.: The information in this case contained five counts, in each of which it was charged that O. Pfefferle and August Gutekunst sold intoxicating liquors at stated times during the year 1886, without having a permit to do so. They were jointly tried, and were both found guilty on each count, but Pfefferle only has appealed.

Gutekunst voluntarily became a witness in behalf of Pfefferle and himself, and upon cross-examination he was asked if he was not an old saloon keeper, and if he had not been tried and convicted in that court several times for the sale of liquor. Other questions of like importance were asked, and the witness over the objection of the defendant, admitted that he had been engaged in the sale of liquor, and had recently been tried and convicted for its unlawful sale. The admission of this evidence is the principal error complained of. By taking the witness stand, Gutekunst changed his *status,* for the time being, from defendant to witness, and was entitled to the same privileges and subject to the same treatment, and to be contradicted, discredited and impeached the same as any other witness. But if a different rule applies to the defendant who becomes a witness, as some authorities seem to hold, it would not avail the appellant, as the defendant Gutekunst has not appealed and is not complaining, and therefore stands in the same relation to the appellant as any other witness. Although there is some diversity of judicial opinion concerning how far a witness may be cross-examined upon matters not relevant to the issue, with a view of discrediting him, yet we think the limits of cross-examination for such purpose rest largely in the discretion of the court; and there is abundant authority for allowing the questions asked in this case. Mr. Wharton, in discussing this question, says that—

"In this country there has been some hesitation in permitting a

question, the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer." (Wharton's Crim. Ev. sec. 474.)

Stephens', in art. 129 of his Digest of the Law of Evidence, in speaking of what are lawful questions on cross-examination, says:

"When a witness is cross-examined, he may be asked any questions which tend—first, to test his accuracy, veracity, or credibility; or second, to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided in article 120, viz., when the answer might expose him to a criminal charge, or penalty."

In Wroe v. The State, 20 Ohio St. 460, the witness for the defendant was asked on cross-examination, "Were you not discharged or compelled to resign from the police force of the city of Dayton?" and also, "Are you not now under indictment for murder in the second degree in this court?" And another witness for the defendant was asked if he had not been indicted for assault and battery in that court, and pleaded guilty. The Supreme Court held that the questions were allowable under the latitude of cross-examination; and stated in its opinion that—

"It is difficult to lay down any precise rule fixing the limits to which a witness may be cross-examined on matters not relevant to the issue. This must in a great measure rest in the sound discretion of the court trying the cause. Such questions may well be allowed when there is reason to believe it will tend to the ends of justice; but they ought to be excluded when the disparaging course of the examination seems unjust to the witness, and uncalled for by the circumstances of the case."

In a later case in that state, where the defendant was on trial for murder in the first degree, and having offered himself as a witness was asked on cross-examination if he had not previously been indicted for assault with intent to kill, and pleaded guilty to the same, and if he had not frequently been arrested in that county on charges of assault and battery, objections to these questions were overruled, and the Supreme Court held that it was within the discretion of the court to allow the questions for the purpose of judging of the character and credit of the witness from his own admissions, and that it did not appear that the discretion had been abused. (Tanoff v. The State, 37 Ohio St. 178.)

In Brandon v. The People, 42 N. Y. 265, the defendant became a witness in his own behalf, and on cross-examination he was asked: "Have you ever been arrested before for theft?" The counsel for the defendant objected to the question on the ground that the prosecuting attorney had no right to attack the character of the prisoner, she not having put her character in issue. The objection was overruled, and the court of appeals held the question proper for the purpose of impairing the credibility of the witness, saying that—

"It has been the practice of the courts of this state from a very early period to permit questions of this character to be put to a witness, and for the purpose indicated. Its abuse is guarded against in two modes: first, by the privilege of the witness to decline to answer any questions which may disgrace him or may tend to charge him as a criminal; second, by the power of the court of its own motion to prohibit an unreasonable or oppressive cross-examination."

The Supreme Court of Michigan considered the propriety of such testimony in a case where the defendant was sworn as a witness in his own behalf and controverted the plaintiff's case. On cross-examination he was allowed, against objection to be asked whether he was ever confined in a state prison. The court held the objection was not tenable saying that—

"It has always been held that within reasonable limits a witnesss may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of the power. But within this discretion we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a state prison may be an important fact for this purpose. And it is not very easy to conceive why this knowledge may not be as properly derived from the witness as from other sources. He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity. If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well-established rules of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining

better credit than an abandoned ruffian." (Wilbur v. Flood, 16 Mich. 40.)

In Clemens v. Conrad, 19 Mich. 170, a witness was required to answer whether he had not been indicted and convicted of a criminal offense. The objection was there made, as it is in this case, that the testimony involved matters of record, and was for that reason objectionable; but Judge Cooley, speaking for the court said:

"We think the reasons for requiring the record evidence of a conviction have very little application to a case where the party convicted is himself upon the stand, and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent. We prefer the early English rule upon the subject: Priddle's Case, Leach C. L. 382; King v. Edwards, 4 T. R. 440; and for the reasons which were stated in Wilbur v. Flood."

The judgment of the District Court will be affirmed.

All the Justices concurring.

FUNDERBERG v. THE STATE.

100 Ala. 36. (1893)

INDICTMENT FOR GAMING.

HEAD, J. The defendant, as all defendants in criminal trials are privileged to do, could have introduced evidence, available to him, of his previous good general character, to be considered by the jury in connection with the other evidence in determining the question of guilt or innocence. It is his *general* character, we say, not particular traits of character, which he may thus put in issue. In the present case, the defendant became a witness in his own behalf, and, to bolster up his testimony, undertook to prove by witnesses that he was a man of good character for *truth and veracity*. This is not allowable. He had not been, or attempted to be impeached as a wit-

ness, by the State, either by the introduction of evidence of bad character on his part, or of statements made by him out of court, contradictory of his testimony on the trial; without which he would not be permitted to sustain himself as a witness, by proof of his good character for truth and veracity. The fact that his testimony conflicted with that of other witnesses gave him no right to introduce evidence of his character. That constituted no impeachment. If the defendant desired to avail himself of good character to be considered by the jury, as a fact, on the question of guilt or innocence, which we have said he had a right to do, he should have introduced his *general* character, not limited to truth and veracity.

There is no error in the record and the judgment is affirmed.

Affirmed.

STATE v. SPERITUS.

191 Mo. 24. (1905)

BURGESS, P. J. On the 20th day of April, 1904, there was filed an information in the office of the clerk of the Circuit Court of the city of St. Louis by W. Scott Hancock, assistant circuit attorney of said city, under his oath of office, charging the defendant with burglary in the second degree and larceny. Upon trial had, defendant was convicted of both burglary and larceny, and his punishment fixed at three years' imprisonment in the penitentiary for the burglary, and two years for the larceny. After unavailing motions for new trial and in arrest of judgment, defendant appeals.

On the trial, the defendant testified in his own behalf and stated that Vaughn, a witness for the State, was at work for him sometime before the alleged burglary and larceny, and that he found out that Vaughn had been stealing some stuff from him, defendant, and that he paid him off and told him that he had no more work for him. In rebuttal, over the objection of defendant, the State was permitted to prove by Vaughn that he had never been arrested for stealing, and by another witness, that Vaughn had a good reputation for honesty. There was no ground laid for the introduction of this evidence other than as stated, and defendant claims that its admission was error. The argument is that defendant's statement that he had discharged Vaughn was not intended as an impeachment of Vaughn

for veracity and honesty, but as a reason why he had stopped working for the defendant; that if it was not competent for that purpose, the State's counsel should have objected and moved to strike it out, or had the court limit its effect and purpose, and that it could not be taken as a pretext for bolstering up the State's witness and case by evidence of his good reputation.

While we fully appreciate the plausibility of this argument, we are not impressed with its logic, and for these reasons: Conceding, for the sake of the argument, that the testimony was not competent for the purpose of impeaching Vaughn for veracity or honesty, the State was not obliged to object, or move to strike it out, or to ask the court to limit its effect and purpose, but it had a right to do as it did do—meet the charge by countervailing evidence. If a party to a suit introduces illegal and incompetent evidence, it does not lie in his mouth to say that, because the adverse party did not object to it or move to strike it out, he is, therefore, bound by it and precluded from introducing evidence tending to contradict it. Moreover, if a party should object to the introduction of evidence reflecting upon his character, or move to strike it out rather than meet it by evidence tending to show it to be untrue, he would, by so doing, run the risk of unfavorable inferences as to his character being drawn by the court or jury. We recognize the rule that evidence is not admissible to prove the good character of a witness or a party to a suit unless it has in some way been assailed; and in the case in hand we think Vaughn's character was assailed when it was said he was a thief.

Reversed on other grounds.

HOWARD v. McDONOUGH.

77 N. Y. 592. (1879)

This action was brought to recover for the alleged unlawful taking of the materials and fixtures of a job printing office, which were seized by defendant McDonough as city marshal, under an execution against a third person.

Upon the trial a witness for plaintiff testified that shortly after the seizure he made a list or schedule of the articles which he knew to have been taken and of their values, which the witness testified

he knew; the articles were very numerous. The witness was allowed under objection and exception to use the list in testifying to the articles and their value, and after he had gone through the list it was offered and received in evidence under objection and exception. *Held* no error.

The court laid down the rule as to the use of memoranda as follows:

"The law as to the use of memoranda by witnesses while testifying is quite well settled in this State. 1. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired which he intended to make correctly, and which he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial; and then the introduction of the memorandum will not be important; or he may allow the witness to testify quite generally to the items and their values; and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination. Without the use of a memorandum in such cases, it would be difficult, if

not impossible, to conduct a trial involving the examination of a large number of items. (Driggs v. Smith, 36 N. Y. Superior Ct., 283, affirmed in this court; McCormick v. Penn. Central R. R. Co., 49 N. Y. 303.)"

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

BANK v. ZORN.

14 S. C. 444. (1880)

This action was commenced January 7th, 1878, and was upon a promissory note, made by J. B. Zorn, the defendant, on January 29th, 1876, for $157.51, payable to the order of Wroton & Dowling at their office, in Charleston, on October 1st, 1876, and endorsed before maturity to the Bank of Charleston National Banking Association, as collateral security to a note of Wroton & Dowling, given for money borrowed from plaintiff, the collaterals being in the proportion of about $2 for $1 of principal debt. The note of Wroton & Dowling was renewed several times after October 1st, 1876, the defendant's note, with other collaterals, remaining in the possession of the bank.

The evidence showed that Wroton & Dowling were cotton factors and commission merchants in Charleston, and the defendant, a farmer, resident in Barnwell county, was one of their customers, the note in suit having been given for supplies of merchandise advanced defendant by them, the understanding being that it was to be met by the proceeds of cotton to be shipped to them by defendant for sale on commission, as was the general custom in Charleston between factors and their country customers.

SIMPSON, C. J. It is objected, second, that an account current between the respondent and Wroton & Dowling was allowed to be made use of by the defendant, respondent, as a witness, to refresh his memory as to the amount of money in the hands of Wroton & Dowling, at a certain date, sufficient to have discharged the note in question and this is made the second ground of appeal. The rule upon this subject, in its broadest outline, embraces two classes of cases: first, where the witness, after referring to the paper, speaks from his own memory, and depends upon his own recollection as to

the facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein. In the first class the paper is always permitted to be used by the witness without regard to when or by whom made.

In the second class this rule of admission is much more stringent. In fact, it cannot be used unless it be an original paper made by the witness himself, and contemporaneously with the transaction referred to.

Admitted under any other circumstances, it would be obnoxious to the doctrine of hearsay and other important principles regulating the admission of evidence, and would render the administration of justice uncertain and doubtful. The principles above laid down will be found sustained in 1 Greenl., paragraph 436; State v. Rawls, 2 N. & McC. 331; Cleverly v. McCullough, 2 Hill 446; and O'Neale v. Walton, 1 Rich. 234. In this case the account current was offered in evidence, but, upon objection, was ruled out. The witness was afterwards permitted to examine it, and upon this examination he was prepared to speak from recollections, and did so speak, as it appears from the record—at least so we understand from the brief agreed upon by the counsel. Whether he was entitled to credit, testifying under such circumstances, or could speak from memory after examining the paper, was for the jury, and is not a matter before us. The question here is, was it legally competent for him thus to testify? We think this case falls within the first class above referred to, and that there was no error on the part of the circuit judge in ruling the testimony competent.

The judgment below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

MILLER v. PREBLE, Admr.

142 Ind. 632. (1895)

JORDAN, J. Appellee instituted this action against appellant, to recover a money judgment, and to enforce a vendor's lien against the real estate described in the complaint.

A trial, by jury, resulted in a verdict in favor of appellee, and over appellant's motion for a new trial judgment was rendered for the

amount assessed by the jury, and for a foreclosure of the lien in question.

The first contention of the appellant's learned counsel is, that there was error in the trial court, allowing one John Ingles, a witness in behalf of appellee to testify relative to certain statements made by appellant in a former examination. This question is not clearly presented by the record, for the reason that the objections and exceptions interposed by appellant to the evidence, and the ruling of the court thereon, are so irregular and in such confusion in the bill of exceptions as to leave the question in doubt as to what were the grounds of the objections made. It may be said to appear, however, from the statements of Ingles, when on the witness-stand, that he was a stenographer, and that previous to the trial he had acted in that capacity, in taking down in shorthand notes an examination of appellant, had before one Jacob Kroch, whose official character, if any is not disclosed. Appellee, for the purpose of impeachment, sought to prove by this witness, that the appellant had, upon the occasion of this examination, made statements upon certain material points which were different from those made by him upon the trial, relative to the same points.

It further appears that the witness, after refreshing his memory by his shorthand notes made by him upon the aforesaid occasion, read therefrom to the jury certain parts of appellant's examination, bearing upon the question involved. The witness stated that after refreshing his memory by these notes he remembered, independently thereof that the statements which he had read to the jury were those made by the appellant upon said examination. There is no contention that these statements as given to the jury by this witness were not correct.

Under the facts, so far as they are disclosed to us by the record, the court did not err in permitting this witness to thus testify. Sage v. State, 127 Ind. 15; Bass v. State, 136 Ind. 165.

But appellant's counsel urge and say "That this examination bore the signature of appellant, and was taken under the statute, and if appellee desired to use it upon the trial to impeach appellant, as a witness, he ought to have introduced the written examination as an entirety and not in parts." But this latter proposition is not borne out or presented by the record, inasmuch as it does not appear therefrom, that the examination in question was taken before any authorized officer, or that it had been filed as a deposition in court, or that it existed at the time of the trial in any other form than the short-

hand notes of the stenographer. Surely if the examination had been taken by appellee, and filed under the statute, and had the latter seen fit to have used it upon the trial to impeach appellant, he could not have been compelled to read the entire deposition to the jury, but would have been permitted to select and read such parts, if he desired, as tended to contradict or impeach the witness upon the material point in question. In this event, however, appellant would have had the right, at the proper time, to have read to the jury so much, or all, if necessary and pertinent, as tended to explain or modify the statements introduced against him, or as tended to show that his testimony on the examination upon the point involved was consistent with the statements made by him upon the trial. Bass v. State, *supra*.

The next alleged error of which appellant complains is that of the court in admitting the depositions of Catherine Earley and W. S. Young, for the reason, as insisted, that these depositions embraced evidence in chief only. The cause was to put at issue by a denial, and plea of payment, and the depositions in controversy seem to contain evidence, which at least tends to rebut that of appellant given under his plea of payment, and therefore they were proper to be read to the jury in rebuttal. But if it were conceded that these depositions were wholly in chief, it however was within the discretion of the court to admit them at any stage of the trial, and unless an abuse of this discretion, prejudicial to appellant, was properly disclosed by the record, the action of the court in admitting them in rebuttal would not alone constitute reversible error. Western Union Tel. Co. v. Buskirk, 107 Ind. 549; Stewart v. Smith, 111 Ind. 526.

There is no apparent available error, and the judgment is therefore

Affirmed.

OVERTOOM v. C. & E. I. R. R. CO.

181 Ill. 323. (1899)

MR. JUSTICE CARTER delivered the opinion of the court:

The appellant brought her action against appellee, in the Superior Court of Cook County, to recover damages for the alleged wrongful killing of her intestate, Adrian Overtoom. There was a verdict and a judgment for the defendant, which judgment has been affirmed by

the Appellate Court. The errors alleged by appellant on this her further appeal relate to the admission and exclusion of evidence and to the giving and refusing of instructions.

Edward H. Senniff, who, acting as attorney and stenographer for appellee took in shorthand notes the testimony of the witnesses at the coroner's inquest and upon the trial below, was called as a witness on appellee's behalf, testified that his notes were correct, and against the objection of appellant, was permitted to read to the jury his notes so taken of the testimony of Thomas J. Silverman, a witness for appellant, for the purpose of impeaching Silverman. Silverman had testified on the trial that he was about one hundred yards away and saw the train strike Overtoom, and that he ran to him and helped turn him over; that the gates were open at the time and that the train was running thirty or thirty-five miles an hour; that he did not hear the bell ring or whistle blow; that the freight train made a great deal of noise. The witness Senniff read from his notes to the effect that Silverman testified at the coroner's inquest that the gates were down at the time of the accident. Senniff testified that he remembered in a general way, what the testimony was, but could not say that he had any independent recollection outside of his notes. The witness did not pretend to testify from memory refreshed by his notes, but read his translation of so much of his notes to the jury as evidence as was called for, the court remarking on overruling plaintiff's objection, that it was "much better than testifying from memory." It is not necessary in this case to consider whether the notes of testimony taken by one who was present and heard it, and who swears to their correctness, may not in some cases be competent as the best evidence of what that testimony was. (See Mineral Point Railroad Co. v. Keep, 22 Ill. 9; Roth v. Smith, 54 id. 431; Iglehart v. Jernegan 16 id. 513; Schoonover v. Myers, 28 id. 308; Wilson v. Genseal, 113 id. 403; Kankakee and Seneca Railroad Co. v. Horan, 131 id. 288; Luetgart v. Volker, 153 id. 385; Brown v. Luehrs, 79 id. 575.) But in Phares v. Barber, 61 Ill. 271, this court held that it was not error to exclude a transcript of a stenographic report of a witness' former testimony, offered for the purpose of contradiction. In the case at bar, the stenographer's notes, or the transcript of them, were incompetent for another reason: The testimony of Silverman was taken by the coroner, and, as the statute required it, we will presume it was written out and signed by the witness and filed and preserved in the office of the Coroner. (Rev. Stat. chap. 31, sec. 18.) Had his deposition thus taken been produced and Silverman's atten-

tion properly directed to it, it could have been used to contradict him (Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481; United States Life Ins. Co. v. Vocke, 129 id. 557.) That deposition was the best evidence, and the stenographer's notes were not admissible.

The error in allowing the notes of Senniff to be read in evidence was intensified by the following erroneous instruction given at the request of the defendant:

"The jury are instructed that if they believe any witness has testified falsely, then the jury may disregard such witness' testimony, except in so far as it may have been corroborated by other credible evidence in the case which you believe to be true."

A witness may have testified falsely upon some matter inquired about, from forgetfulness or honest mistake, and in such case the jury would not be authorized to disregard his entire testimony, whether corroborated or not. It is the corrupt motive, or the giving of false testimony, knowing it to be false, that authorizes a jury to disregard the testimony of a witness and the court to so instruct them. (Pollard v. People, 69 Ill. 148; Pennsylvania Co. v. Conlan, 101 id. 93; 11 Encyc. of Pl. & Pr. 304.) Standing alone, this instruction has other patent defects not necessary here to mention.

The judgment of the Appellate Court and that of the Superior Court are both reversed, and the cause is remanded to the latter court for further proceedings not inconsistent with what we have here said.

Reversed and remanded.

COMMONWEALTH v. JEFFS.

132 Mass. 5. (1882)

Indictment for the manslaughter of James M. Jeffs, at Gloucester, on September 1, 1881.

At the trial in the Superior Court, before Rockwell, J., the government offered evidence of statements made and evidence given by the defendant at the inquest. To contradict this evidence, the defendant called one Stickney, a short-hand reporter and editor of a newspaper in which a report of the defendant's statements and evidence at the inquest had been published, and asked him what the defendant said at the inquest. He answered, that he could state by refreshing his memory by the report in the newspaper, and was allowed to so re-

fresh his memory; but, as the defendant's counsel was in the act of handing him the paper, the witness said that, upon reflection, he did not need to look at it, and did not actually take the paper in his hands at that time, but proceeded to give his evidence. The reporter also stated, that his minutes of the evidence had gone into the waste-basket, and that the newspaper only contained from one-third to one-half of the full evidence, being the most important part of the same.

On cross-examination, the witness was asked a question by the government, and replied that he could better answer the question if he was allowed to refresh his memory from said newspaper, whereupon the attorney for the government said, "Very well, you may do so." He refreshed his memory from the newspaper, and then answered. The counsel for the defendant then asked to have the newspaper read to the jury, or so much of the report in it as related to the inquiry of the government. The judge, on the objection of the government, excluded the same. The defendant alleged exceptions.

ENDICOTT, J. A witness may be allowed to refresh his memory by looking at a printed or written paper or memorandum, and, if he thereby recalls a fact or circumstance, he may testify to it. It is not the memorandum which is evidence, but the recollection of the witness. We are not aware of any case where it has been held that the memorandum could be put in evidence simply because it refreshed the memory of the witness. Commonwealth v. Ford, 130 Mass. 64. In that case, and in many of the cases cited therein, it is stated that the memorandum *per se* cannot be used in evidence.

In Field v. Thompson, 119 Mass. 151, it was held that the memorandum was not competent and that it could not be put in evidence in confirmation of the recollection of the witness. Alcock v. Royal Exchange Assur. Co., 13 Q. B. 292. On the other hand, where a witness produces a memorandum to assist his memory, the opposite party is entitled to inspect it, and he may cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it could not properly refresh the memory of the witness. But even in such a case, only those portions of the memorandum which relate to the cause on trial and the testimony of the witness can be put in evidence. Commonwealth v. Haley, 13 Allen, 587.

In Dugan v. Mahoney, 11 Allen, 572, it was held that if a witness, upon looking at a memorandum made by him at the time, is able to testify to the delivery of goods, the testimony is admissible, although the witness has no present memory of the transaction, and the mem-

orandum itself is incompetent. In that case, the memorandum consisted of certain entries made in a book, and it was said in the opinion, that the books were properly submitted to the jury, because the testimony of the witness to his positive knowledge of the fact in issue and his means of knowledge were regularly before the jury, and it was for the jury to consider them. See Rex v. Ramsden, 2 C. & P. 603. So a witness may be required in the discretion of the court to look at memoranda or papers to aid his recollection. Chapin v. Lapham, 20 Pick. 467. And in Commonwealth v. Fox, 7 Gray, 585, a witness was called who could not read or write, and a paper signed with her mark was produced as a memorandum to refresh her recollection; and it was held that the paper could not be read to the witness in the presence of the jury, but that the witness should withdraw with one of the counsel on each side and the paper should be read to her without comment.

In the case at bar, one of the witnesses for the defendant was allowed, in answer to a question put by the attorney for the government, upon cross-examination to refresh his memory from a report, published in a newspaper, of the defendant's statements at the inquest, and the defendant thereupon, without putting any question to the witness, asked to have so much of the paper as related to the inquiry by the district attorney read to the jury. The court excluded it. It does not appear what facts the witness testified to after looking at the paper, or what were the contents of the report, or that the same was called to the attention of the presiding judge, or that it was offered for the purpose of showing that it could not properly refresh the memory of the witness, or that any reason was given or any ground was stated why it was admissible. It is consistent with the bill of exceptions that the defendant offered it for the purpose of confirming the testimony of her own witness.

It may be that under certain circumstances the paper might properly have been admitted, but, as the case is stated, it falls within none of the exceptions to the general rule, that a memorandum used to refresh the memory of a witness is not in itself evidence for the jury. The bill of exceptions affords us no means of determining that its exclusion was wrong.

Exceptions overruled.

PART III.

PRINCIPLES AND RULES OF EXCLUSION.

RELEVANCY AND MATERIALITY.

HUDSON v. C. & N. W. R. R. CO.

59 Iowa 581. (1882)

Plaintiff claims damages in the sum of one hundred dollars for an injury to a horse, alleged to have been caused by a defective crossing over defendant's road; the defect consisting in placing the plank on the inside of one of the iron rails of the road so far from the rail that, in driving the horse over the crossing, he stepped into the aperture thus made, and was injured and crippled.

There was a trial by jury and a verdict and judgment for the plaintiff. Defendant appeals.

ROTHROCK, J. Plaintiff introduced a witness who testified that, some six months before the accident complained of, a horse driven by him over the crossing in question got his foot between the plank and the rail at the same place where plaintiff's horse was injured. The defendant objected to this testimony as incompetent. The objection was overruled and an exception taken. Upon this point in the case the Circuit Court certified the following question: "Ought the court to have admitted evidence of former accidents at the same place to parties other than the plaintiff?"

In Collins v. Inhabitants of Dorchester, 6 Cush. 396, the plaintiff was injured by driving against a post in a highway. He sought to prove that another person had met with precisely the same kind of accident before, at the same place, and from the same cause.

In determining the question the court said: "The testimony of Sprague that he, before the injury complained of by the plaintiff, received a similar injury at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts which furnish no legal presumption as to the principal facts in dispute, and which defendants were not bound to be prepared to meet. 2 Stark. on Ev., 381; 1 Green. Ev. sec. 52."

Parker v. Portland Publishing Company, 69 Maine, 173, was an action to recover damages for negligence in not properly lighting a passage way. Evidence was received tending to show at different times the condition of the hallway and the entrance to the rooms of the building as to light—whether more or less or none—and of what had happened to other men at other times, and of their fortunate escape from peril. The court, Appleton, J., said: "These facts were all collateral to the main issue, and should have been excluded." Citing 1 Greenleaf on Evidence, Sec. 52. It was further said: "If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them." It was held that allowing such evidence to be introduced was against the entire weight of judicial authority; citing Hubbard v. R. R., 39 Maine, 506; Aldrich v. Pelham, 1 Gray, 510; Kidder v. Dunstable, 11 id. 342; and other cases.

In Blair v. Pelham, 118 Mass. 420, an action for a personal injury caused by a defect in a highway, it was held that what happened at the same place a year before was rightly rejected.

A different rule was announced in the case of Kelley v. The Southern Minn. R. R. Co., Sup. Court of Minn., N. W. Rep., Vol. 9, 588. But it appears in that case that the testimony objected to showed that the accident to which it related "was produced by a different cause, and at a point in the crossing about the condition of which there was no complaint," and the court held that the defendant, if it deemed the evidence prejudicial, should have moved to have it stricken out. The rule as stated in the opinion in that case is not discussed, and no authority is given in its support.

We think, both upon principle and authority, the evidence in question was improperly admitted, and that the question certified must be answered in the negative.

Reversed.

HOUSE v. METCALF.

27 Conn. 631. (1858)

Action on the case for damage from a nuisance. The declaration alleged that the defendant, on the 21st day of March, 1857, was possessed and in the actual occupation and use of a certain gristmill, in the town of Lebanon, erected within the inclosed limits of a cer-

tain highway and within twenty feet of the traveled path, which was operated by a large overshot water wheel, uninclosed and uncovered, which when in motion was calculated to frighten horses; that the mill and wheel were, and ever since they had been erected had been a public nuisance; and that, on said 21st day of March, the plaintiff was driving by the mill, along the traveled path, in a buggy, with a valuable horse belonging to him, and was using care and skill in driving when the horse became frightened at the water wheel, which was in motion, and to such a degree that the plaintiff could not control him, and ran with great violence until he fell and threw out the plaintiff with great force upon the ground, hurting him seriously, and greatly injuring the horse and breaking the buggy in pieces. The case was tried by the jury, on the general issue.

On the trial, the plaintiff, for the purpose of showing that the mill was a nuisance, offered one Arabella Cobb as a witness, to prove that in the year 1844, when the mill was the same in all respects, she was driving along the highway leading by the mill, when the wheel was in motion, and that her horse became frightened thereby. The plaintiff did not claim that this fact was ever known to the defendant. To the admission of this testimony the defendant objected, but the court admitted it.

SANFORD, J. 1. The defendant claims that the testimony of Arabella Cobb, to prove that the same wheel which frightened the plaintiff's horse also frightened hers, ought not to have been received.

We think it was properly admitted. The plaintiff's claim was, that the wheel in motion was an object naturally calculated to frighten horses traveling on the public road, and was, therefore, a public nuisance. And we think he had a right, not only to show the facts regarding its size, form, location, exposure to view, and mode of operation, from which the jury might infer what effects it would naturally, necessarily, or probably produce, but also to prove what effects it had produced in fact. A single instance should indeed be of little avail standing alone. A number of instances might afford satisfactory, if not demonstrative evidence. And the inquiry in every such case is, not whether the evidence offered is sufficient to prove the fact claimed but whether it tends to prove it.

It is claimed that the evidence was objectionable because it presented a new issue to the triers, and operated as a surprise upon the defendant. That the reception of the evidence rendered proper an inquiry into the character of Miss Cobb's horse, and her ability to manage him, and, indeed, into all of the circumstances under which

the accident occurred, is not to be denied; as the value of the result always depends upon the fairness of the experiment, and the triers cannot know how to appreciate the one, until the other is made known to them. But every piece of evidence, introduced in any case, is, or may be, subjected to the same or similar tests, and cannot for that reason be rejected. And because the fact to be established to wit, that the wheel was an object of terror to horses, was directly involved in the issue on the record, and the evidence objected to tended to establish it, and therefore to prove the issue, the defendant was bound to come prepared to meet it. It was of no importance that the defendant was ignorant of Miss Cobb's misfortune. The question was, whether testimony that her horse was frightened by the wheel conduced to prove that wheel a nuisance; and the defendant's ignorance of the accident had no bearing on the question.

New Trial not Advised.

GRAND TRUNK R. R. CO. v. RICHARDSON.

91 U. S. 454. (1875)

This is an action by the defendants in error to recover damages for the destruction of their saw-mill, lumber-shed, store, boardinghouse, manufactured lumber, and other personal property, by fire, alleged to have been communicated by a locomotive engine of the plaintiff in error on the seventh day of June, 1870.

MR. JUSTICE STRONG delivered the opinion of the court:

The plaintiffs below were permitted to adduce evidence that those of the injured buildings which were within the lines of the road way had been erected within those lines by the license of the company, for the convenience of delivering and receiving freight. The admission of this evidence is the subject of the first assignment of error; and in its support it has been argued that it was the duty of the railroad company to preserve its entire road way for the use for which it was incorporated; that it had no authority to grant licenses to others to use any part thereof for the erection of buildings; and, therefore, that the license to the plaintiff's, if any was made, was void. Thus the basis of the objection to the evidence appears to be, that it was immaterial. We are, however, of opinion that it was properly admitted. If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown; and while it

must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted that the defendant might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the company might have put up the buildings, why might it not license others to do the same thing for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers. There is, then no well-founded objection to the admission of evidence of a license, or evidence that the plaintiff's buildings were partly within the line of the roadway by the consent of the defendant.

The second assignment of error is, that the court excluded testimony offered by the defendant to show that the usual practice of railroad companies in that section of the country was not to employ a watchman for bridges like the one destroyed. It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined was, whether the defendant had been guilty of negligence; that is, whether it had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise. Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. Besides, the degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case. When the fire occurred which caused the destruction of the plaintiffs' buildings, it was a very dry time, and there was a high wind. At such a time, greater vigilance was demanded than might ordinarily have been required. The usual practice of other companies in that section of the country sheds no light upon the duty of the defendant when running locomotives over long wooden bridges, in near proximity to frame buildings, when danger was more than commonly imminent.

The third assignment of error is, that the plaintiffs were allowed

to prove, notwithstanding objection by the defendant, that, at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. Piggott v. R. R. Co., 3 M. G. & S. 229; Sheldon v. R. R. Co., 14 N. Y. 218; Field v. R. R. Co., 32 id. 339; Webb v. R. R. Co., 49 id. 420; Cleveland v. R. R. Co., 42 Vt. 449; R. R. Co. v. Williams, 42 Ill. 358; Smith v. R. R. Co., 10 R. G. 22; Longabaugh v. R. R. Co., 4 Nev. 811. There are it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage. We cannot, therefore, sustain this assignment.

The judgment is, therefore, affirmed.

MILLER v. PENDLETON.

74 Mass. 547. (1857)

Action of tort against a ferryman on the Connecticut River, for the loss of the plaintiff's horse and wagon by the negligence of the defendant's servants while crossing the ferry.

At the trial in the Court of Common Pleas in Hampden, before BISHOP, J., the plaintiff introduced evidence tending to show that there was a chain at the forward end of the boat, which, if it had been fastened up, would have prevented the horse from going overboard. The defendant offered evidence, which was admitted without objection, that his custom was to have the chain put up when passengers requested it and not otherwise, and that the person in charge of the plaintiff's horse and wagon did not request it. He also offered to prove that it was customary, at other ferries on the Connecticut River, to have a chain, and manage it in a similar way. But this evidence was objected to, and excluded.

BY THE COURT. The evidence of custom was rightly rejected, for several reasons. It did not tend to prove a general usage, or to prove that the defendant's custom was right in this particular case. The usage sought to be proved would not be a good usage if it prevailed; it would make the safety of the passenger depend upon his own conduct, and not on the care and vigilance of the ferryman. If the putting up of the chain was a reasonable and proper precaution, it ought to be put up by the ferryman, without a request; if it was not, a request would not make it so.

Exceptions overruled.

SHELDON v. THE HUDSON RIVER R. R. CO.

14 N. Y. 218. (1856)

This action was to recover the value of a building called the mill-house, and its contents, which stood upon the plaintiff's premises in Greenburgh, Westchester county, about sixty-seven feet from the track of the defendant's railroad. The complaint alleged that in February, 1852, the defendants so carelessly and unskillfully ran and managed a locomotive steam engine, which was imperfectly, un-

skillfully and negligently constructed, over their road, that sparks and coals of fire escaped from the engine and communicated fire to the building which, with all its contents, was consumed. The answer denied the complaint. The cause was tried before Justice S. B. Strong and a jury at the Westchester County Circuit Court, and the plaintiff was non-suited. The plaintiff made a bill of exceptions, and on appeal the judgment was affirmed at a general term in the second district. The plaintiff appealed to this court. The only question decided by this court was an exception to the exclusion of evidence offered by the plaintiff. This question is stated in the opinion, by Denio, C. J.

DENIO, C. J. The plaintiff owned and possessed a building used as a storehouse, in Greenburgh, Westchester county, standing on the easterly side of the defendants' road, and about sixty-seven and one-half feet from the track. It was in the charge of two of the plaintiff's servants. The outer doors were kept locked, and no fire was in it. On the 7th of February, 1852, it took fire and was consumed. It was proved that about twenty-five minutes before the fire was discovered, a train of cars of the defendants drawn by a locomotive engine called the Oneida, passed the place. On the first floor of the building there was a parcel of shavings and a quantity of lumber, and some of the glass in the windows of that story had been broken. As I understand the testimony, the place where the fire was first seen was on this floor, and not far from one of the windows. Having proved these facts, and that the day on which the fire took place was windy, the direction of the wind being towards the building, and the persons in charge having sworn that no person, to their knowledge, had been in it during that day, the plaintiff proposed to prove, by a witness who lived close to the railroad and about one-fourth of a mile from the building, that shortly before it was burned he had seen sparks and fire thrown from the engines used by the defendants in running their trains, through the witness' premises, a greater distance than this building stood from the track of the railroad, and that he had picked up from the track after the passage of the trains, lighted coals more than two inches in length. The evidence was objected to by the defendant's counsel and excluded by the court. The plaintiff's counsel excepted.

It is argued by the defendants' counsel that the evidence offered and rejected was too remote and indefinite to have a just influence upon the particular question in issue in the case; that it did not refer to any particular engine, and that it may be that the one which ran

past the plaintiff's premises, just before the discovery of the fire, was a quite different one from those which scattered fire on occasion to which the evidence offered would apply. This argument is not without force; but at the same time I think it is met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them, that a stranger to the business cannot readily distinguish one from another. It will, therefore, generally happen that when the property of a person is set on fire by an engine, the owner, though he may be perfectly satisfied that it was caused by an engine, and may be able to show facts sufficient legitimately to establish it, yet he may be utterly ignorant what particular engine, or even what particualr train did the mischief. It would be, practically, quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of the operation. I think, therefore, it is competent *prima facie* evidence for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be ilkely to set on fire objects not more remote than the property burned.

The judgment must be reversed and there must be a new trial.

CROCKER v. McGREGOR.

76 Me. 282. (1884)

On exception and motion to set aside the verdict, by the defendant.

LIBBEY, J. This action comes before this court on exceptions and motion. It is for an injury to the female plaintiff, alleged to have been caused by the fright of her horse by steam escaping from the defendant's mill, situated on the margin of the public highway, which the plaintiff alleges was a public nuisance to the travel over the way.

The exception is to the admission of evidence produced by the

plaintiff. Witnesses for the plaintiff were permitted to testify that when travelling by the mill with horses well broken and ordinarily safe, their horses were frightened by the escaping steam. This evidence was limited to a short time before and after the plaintiff's injury, when the mill was in the same condition as when she was injured; and was admitted for the sole purpose of showing the capacity of the escaping steam to frighten the ordinary horses. We think it was properly admitted.

The issue was, whether the mill as constructed and used, with the steam escaping into the way, was a nuisance to the public travel. Evidence showing that it naturally frightened ordinary horses when being driven by it, was competent to show its effect upon the public travel, its character and its capacity to do mischief. Its effect on horses was not dependent upon the acts of men, which may be the result of incapacity or negligence, but was caused by action of the inanimate thing upon an animal acting from instinct. It was not to show that other parties were injured at the same place by the same cause, and is, therefore, distinguishable from cases against towns for injury from defects in a highway, in which this court has held that evidence of accidents to others at the same place is inadmissible, because it raised too many collateral issues. Here the only issue is the effect to the sight and sound of the steam upon ordinary horses, as tending to show that travel over the way was thereby rendered dangerous. Hill v. P. & R. Railroad Co., 55 Me. 439; Burbank v. Bethel Steam Mill Co., 75 Me. 373. We think the competendency of the evidence rests upon the same principle as evidence in actions against railroad corporations for damage by fire, alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of. Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

Exceptions and motion overruled.

PETERS, C. J., WALTON, DANFORTH and VIRGIN, JJ., concurred.

LORING v. WORCESTER & NASH R. R. CO.

131 Mass. 469. (1881)

Tort for the destruction of the plaintiff's property at Sterling Junction, by fire alleged to have been communicated from a locomotive engine of the defendant, on Saturday, June 29, 1878. At the trial in the Superior Court, before Aldrich, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the exclusion of certain evidence, the nature of which appears in the opinion.

MORTON, J. The defendant introduced evidence that the engine, which the plaintiff contended communicated fire to his barn, "was furnished with the ordinary appliances of a cone and netting for arresting sparks, which netting was examined on arrival at Worcester on the return trip the following Monday and found to be whole and in good condition." It was accompanied by evidence that the engine on the return trip was in the same condition and used the same kind of fuel as on the outward trip on Saturday. The obvious purpose of the evidence was to induce the jury to believe that the engine on the trip on Saturday could not emit sparks which would communicate fire to the plaintiff's barn.

We are of opinion that it was competent for the plaintiff to show that the engine on the return trip emitted sparks which set fire to property in the same neighborhood. Such evidence tended to show that the spark-arrester, testified to by the defendant's witnesses, was either faulty in construction or out of repair, and thus to rebut the presumption which the jury might draw from the defendant's evidence, which it tended to contradict and control. Ross v. Boston & Worcester Railroad, 6 Allen, 87.

Exceptions sustained.

HEWITT v. TAUNTON STREET RY. CO.

167 Mass. 483. (1897)

Tort, by the administrator of the estate of Frederick Hewitt, for causing his death.

At the trial in the Superior Court, before Lilley, J., it appeared that the plaintiff's intestate was a child three years and eight months

old, and lived with his parents on Bay Street in Taunton, which was one of the main thoroughfares in the city, and upon which the defendant's electric railway ran; that, on the day of the accident, the child's father came home about five o'clock in the afternoon and went directly into the house, leaving the child alone in the yard, where he was then playing; that the yard adjoined the sidewalk, having a fence with gates opening thereon; that the child's mother was also in the house, and both parents remained there, attending to domestic duties and taking no notice of the child for about fifteen minutes; and that the child was seen to run across the street with a companion, and then start to return running diagonally across the street with his back turned towards an approaching car, which struck and killed him.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the refusal to rule that, "as matter of law, the parents of the child were not exercising due care, and so the plaintiff could not recover," and also to the admission of certain evidence, the nature of which appears in the opinion.

ALLEN, J. The two grounds upon which the plaintiff relied were, that Carroll was an incompetent man in the position which he occupied, and that there was gross negligence on the part of Carroll and Smith in the operation of the car. Carroll was a witness for the defendant, and on his cross-examination the following question and answer were admitted, under exception: Q. Have you had any car to run since the accident? A. No car to run steady." There was also some evidence respecting Carroll's pay. In respect to this evidence, the court instructed the jury as follows: "That was admitted as bearing upon the question merely of the light in which Carroll was viewed by the defendant company itself." The admission of this evidence for the purpose stated presents the question whether the virtual discharge of a servant from his regular employment after an accident can be proved, in a case like this, as an implied admission by his employer that he had been careless, or was incompetent. The plaintiff contends that this evidence bore directly on the defendant's negligence or carelessness in employing such a person.

It has heretofore been held that taking additional precautions, after an accident, to prevent other accidents, is not admissible in evidence in a case like this for the purpose of showing negligence. Shinners v. Proprietors of Locks & Canals, 154 Mass. 168. Downey v. Sawyer, 157 Mass. 418. Columbia & Puget Sound R. v. Hawthorne, 144 U. S. 202. The same reasons which led to those decisions apply in the

present case. To hold otherwise would tend to discourage the adoption of additional safeguards by improving the quality and raising the standard of the service. The admission of this evidence for the purpose stated may have prejudiced the defendants case in the mind of the jury.

Exceptions sustained.

CHARACTER.[1]

HARWOOD v. THE PEOPLE.

26 N. Y. 190. (1863)

DAVIES, J. The indictment charged the plaintiff in error with keeping a bawdy house. It was proved that he kept a house in the city of Syracuse, and to make out the offense, it was necessary to establish the character or kind of house so kept by him. A bawdy house is defined to be a house of ill-fame, kept for the resort of unlawful commerce of lewd people of both sexes. (Bouv. Law Dic., vol. 1, p. 163.) It was essential therefore, for the prosecution to establish the character of the house, and to show the character of the persons frequenting or occupying it. The questions put to the witnesses objected to, only called out the fact that females were found in the house of the plaintiff and were taken from there, before a magistrate, and convicted as prostitutes, and punished as such. This was *prima facie* evidence of the character of the persons frequenting the plaintiff's house, and was legitimate and proper evidence, to establish such character. Proof that prostitutes were found frequently at the plaintiff's house, and were notoriously so, were circumstances bearing directly on the issue, whether the plaintiff kept a bawdy house or house of ill-fame, and the jury would be warranted in finding as they did, from such circumstances and the additional one that convicted and notorious prostitutes were frequently arrested there, that he kept a house of that character. The materiality of the inquiry did not consist in the fact that arrests of such women were made in the plaintiff's house, but in the fact that women of such character were frequently found there, and permitted there after their arrest and conviction as prostitutes. The inquiry as to the agency of the plaintiff in procuring bail for them, when arrested upon such charges, was

eminently legitimate as tending to show his knowledge of the character of the women occupying and frequenting his house. A man careful of the reputation of his house, and regulating it upon correct principles, is not accustomed to have found there women notoriously charged with the offense of prostitution; and for the purpose of fixing on the plaintiff the knowledge of the character of the inmates of his house, and as their character and habits determined the kind and character of the house he kept, it was proper to show that he knew these charges against them, and that such knowledge was evidenced by his becoming bail for them before the police magistrate. The time of making the arrests was of no materiality, except as indicating the presence in the plaintiff's house of women of the character his inmates were proved to be, and the time when they were thus found to be there was a material inquiry; and in this aspect, the questions as to the time of making the arrests and when last made, were properly allowed to be put.

In the view we take of this case, and the facts necessary to be established by the prosecution, to warrant the jury in convicting the plaintiff, the judge correctly told the jury that the frequent arrests at the plaintiff's house of females, theretofore convicted as prostitutes, was a circumstance proper to be taken into consideration by the jury in making up their verdict. It was not the fact that such females were frequently arrested in the plaintiff's house, which gave point and significance to this part of the charge, but the fact that females theretofore convicted as prostitutes were frequently found in the plaintiff's house. The fact of such conviction stamped them as prostitutes, and its notoriety, and the circumstance of such frequent arrests must have brought home to the plaintiff knowledge of their character. The character of the inmates of the plaintiff's house determined the kind of house he kept, and if it was frequented by prostitutes, notoriously so, and they were frequently arrested there by the police officers, the jury were authorized to find it was a bawdy house or house of ill-fame.

We see no error in the admission of the evidence objected to, or in that part of the charge excepted to, and think the judgment should be affirmed.

Judgment affirmed.

[1]Hughes on Evidence, p. 39.

WINN v. PECKHAM.

42 Wis. 493. (1877)

Action to recover damages for an alleged malicious prosecution of the plaintiff, by the defendant, for perjury. The testimony on the trial tended to show the facts.

LYON, J. Evidence was received of the pecuniary condition of the defendant. This is claimed to be error. The action is one in which the jury might properly award exemplary damages in their discretion, and it is settled in this state that in such an action testimony of the pecuniary circumstances of the defendant is competent.

By the Court. Judgment affirmed.

HOUGHTALING v. KELDERHOUSE.

2 Barb. (N. Y.) 149. (1848)

This was an action of slander, for charging the plaintiff with having killed the defendant's horses by administering poison to them. The defendant pleaded not guilty, and gave notice of justification. The cause came on for trial at the Albany Circuit in June 1845. On the trial the plaintiff proved the speaking of the words as laid in the declaration. The defendant then proved that his horses had been poisoned, and died in consequence thereof on the night of November 6, 1844. The defendant also proved, that, in July, previous to the poisoning, there had been a difficulty between the parties, on the occasion of the settlement of a note the plaintiff held against the defendant, when the plaintiff used harsh language and exhibited some ill feeling against the defendant. The defendant also proved facts and circumstances tending to show that the plaintiff was guilty of having poisoned the horses. After examining a large number of witnesses in support of such justification, he rested his defense.

The plaintiff then offered to prove that after the settlement of the note, and prior to the poisoning, the plaintiff told the witness, in a different conversation and in the defendant's absence, that he was satisfied with the said settlement. This evidence was objected to by the defendants counsel, and excluded by the circuit judge; to which decision the plaintiff's counsel excepted.

After the plaintiff's counsel had called witnesses and introduced evidence in reply to the defendant's testimony, he offered to prove that the plaintiff's general character was good. The defendant's counsel objecting, this evidence was also excluded by the judge, and his decision excepted to by the plaintiff.

The jury gave a verdict in favor of the defendant, and the plaintiff moved for a new trial on a bill of exceptions.

By the Court, PARKER, J. It cannot be necessary to refer to cases to show that the judge was right in not permitting the plaintiff to prove his own declarations, made in the absence of the defendant, and in a conversation different from that previously proved on the other side. The general and well settled rule forbids a party making his declarations evidence in his own favor was clearly applicable. nothing had been proved on the part of the defendant to bring the evidence offered within any exception to that rule.

But the principal point made by the plaintiff, in moving for a new trial, is that the circuit judge refused to receive evidence that the plaintiff's general character was good, which evidence was offered by the plaintiff after testimony had been introduced on the part of the defendant, tending to show that the plaintiff had poisoned the horses of the defendant.

The rule as laid down by the chancellor in Townsend v. Graves (3 Paige, 455,) is broad enough to admit the evidence in question. The chancellor there says, "It is a general rule of evidence that if a party is charged with a crime or any other act involving moral turpitude, which is endeavored to be fastened upon him by circumstantial evidence, or by the testimony of witnesses of doubtful credit, he may introduce proof of his former character for honesty and integrity, to rebut the presumption of guilt arising from such evidence, which it may be impossible for him to contradict or explain." And the chancellor proceeds to say, without dissent, that such doctrine has been held applicable to a defendant in a civil suit, in Ruan v. Perry (3 Caines, 120.) The case last cited went that entire length, and in delivering the opinion of the court in that case, Tompkins, justice, says: "The evidence of character was also in my opinion properly admitted. In actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, as was the case here, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." The same rule was held in Harding v. Brooks (5 Pick. 244.)

But the case of Ruan v. Perry has been distinctly and repeatedly overruled by the Supreme Court of this state, and the English rule adopted, as laid down in The Attorney General v. Bowman (2 Bos. & Pull. 532, note a.) In Fowler v. The Ætna Fire Ins. Co. (6 Cowen, 673) in commenting on the case of Ruan v. Perry, Savage, Ch. J. says: "If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." In the later case of Gough v. St. John (16 Wend. 646,) this question is fully examined by Cowen, Justice; who says the case of Ruan v. Perry is virtually exploded by the late authorities, and that the practice of receiving such evidence has not for many years been followed at the circuit, to any considerable extent. Opposed to Ruan v. Perry, are also the cases of Woodruff v. Whittlesey (Kirby, 60); Anderson v. Long (10 Serg. & Rawle, 55); Nash v. Gilkeson (5 Id. 352); Potter v. Webb (6 Greenl. 14); and Humphrey v. Humphrey (7 Conn. Reports 116). And Justice Cowen cites with approbation the following extract from the opinion of Daggett, justice, in the case last referred to. "Causes charging cruelty, gross fraud, and even forgery, are often agitated in suits by individuals; and the result not unfrequently affects the property and reputation of the party deeply; yet no individual has been permitted to attempt to repel the proof by showing a good reputation." And in the opinion of Justice Cowen on this point, Chief Justice Nelson and Justice Bronson concurred.

I cannot, therefore, hesitate to regard the rule as now well settled in this state, that such evidence is inadmissible in a civil suit. At the time the case of Townsend v. Graves was decided, in 1832, it had probably escaped the notice of the chancellor that the case of Ruan v. Perry had been overruled by the decision in 6 Cowen, made in 1827. And the still later case of Gough v. St. John seems to have put the question at rest in this state. Indeed there appears to be a good reason for the distinction that is taken. In a criminal prosecution, it is safest, in mercy to the accused, that he should avail himself of his previous good character to save himself from punishment in a doubtful case; but in a civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no

proof, except that relating to the facts in controversy, should be admitted to turn the scale.

The admission of such evidence in a criminal case, is but an exception to what must be regarded a general rule, resting upon principle. If the plaintiff might prove his good character to resist the conclusion of his guilt, then it would have been equally proper for the defendant, in the first instance to introduce evidence of the bad character of the plaintiff, for the purpose of sustaining his justification. If character can be legitimately examined, with a view to ascertain the fact of guilt, neither party could be prevented giving evidence in regard to it. The absurdity of such a practice is, we think, apparent.

New trial denied.

COMMONWEALTH v. CHURCHILL.

52 Mass. 538. (1846)

The defendant was indicted, on the Rev. Sts. c. 130, sec. 4, for lewdly and lasciviously associating and cohabiting with Lavinia Cash. At the trial in the Court of Common Pleas, before Cushing, J. the said Lavinia testified in behalf of the Commonwealth, and the defendant, in order to impeach her testimony, offered to prove that she then was, and for ten years next preciding had been, a common prostitute, and obtained her living, in whole or in part, by the prostitution of her person for hire and gain. The judge ruled that the offered proof was inadmissible and excluded it. The jury found the defendant guilty and he alleged exceptions.

SHAW, C. J. This case presents the direct question, whether evidence is admissible to impeach the credibility of a female witness, which tends to show that she is, and for some time has been a common prostitute, and has obtained her living in whole or in part, by the prostitution of her person for gain.

The only reported case, in which it has been held that such evidence is admissible, is Commonwealth v. Murphy, 14 Mass. 387. It was a decision made in the course of a capital trial, and probably without much time for deliberation, or reference to authorities. It was followed, we think, with some doubt and hesitation, in a few other cases not reported. It is referred to in Commonwealth v.

Moore, 3 Pick. 196, and spoken of as a relaxation of the general rule, which confines the impeaching testimony to the general character of the witness for veracity. We consider it as a deviation from the established rule of the common law on the subject. It has been regarded, by the judges of this Commonwealth, with disapprobation, and has not been adopted by the courts of other States. See Jackson v. Lewis, 13 Johns. 504. Bakeman v. Rose, 14 Wend. 105, and 18 Wend. 146. Morse v. Pineo, 4 Verm. 281. The State v. Smith, 7 Verm. 141. Spears v. Forrest, 15 Verm. 435. It is not required by any strong considerations of fitness or expediency, and cannot be regarded as having acquired the force of a settled rule of law. We are therefore of opinion that the decision of the judge, in rejecting the evidence tendered, was correct.

Exceptions overruled.

GAITHER v. BLOWERS.

11 Md. 536. (1857)

LE GRAND, C. J. This is an action of assault and battery, brought by the appellee against the appellant. The pleas were "not guilty and *son assault demesne;*" the replication to the second plea was "*deinjuria et cetera.*"

The second exception of the appellant, grows out of the court's allowing the plaintiff to give evidence, with the view of increasing his damages, that he was a laboring man, and had a wife and children to support.

The general rule is, that it is not necessary to state specially any matters which are the legal and natural consequences of the battery nor are the jury confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require. 2 Greenlf. on Ev., sec. 89. In McNamara v. King, 2 Gilman, 436, the court say, that "in actions of this kind, the condition in life, the circumstances of the parties, are peculiarly the proper subjects for the consideration of the jury, in estimating the damages; their pecuniary circumstances may be in-

quired into. It may readily be supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured. In this class of cases, the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant. The standard of damages is not a fixed one, applicable to all cases, but is to be regulated by the circumstances of each particular case." This is good sense, and is sustained by the decisions in most states. An injury done to a person not dependent on manual labor for the support of himself and family, is in nowise as great as one to a person so situated. We are of opinion the court properly overruled the objection.

Judgment affirmed.

O'BRIEN v. FRASIER.

47 N. J. L. 349. (1885)

The suit was for a malicious prosecution. The declaration set forth, in the usual form, the good character of the plaintiff, and that the defendant, intending to injure her in her fame and credit, without any reasonable cause made a charge of perjury against her, and so caused her arrest and imprisonment in the county jail, until she was discharged on account of no indictment having been found against her by the grand jury; that by means of these facts she was greatly injured in her said credit and reputation, and brought into public scandal, infamy and disgrace, &c. The plea was the general issue.

The opinion of the court was delivered by

BEASLEY, Chief Justice. The basis of the suit was the arrest and imprisonment of the plaintiff on an affidavit made by the defendant, containing a charge of perjury, and which charge, it was asserted had been made falsely, maliciously and without probable cause.

The second objection urged against the proceedings at the trial

also arises from the exclusion of proofs offered by the defendant.

The defendant, desirous, apparently, to disparage the general reputation of the plaintiff in point of morals, asked of a witness the following question: "Do you know the reputation of Mrs. Frasier, in the city of Paterson?" This interrogatory in the form stated was overruled, the court directing the counsel to make the inquiry more specific. The following interrogatories were then propounded and were successively overruled, to wit: "Are you acquainted with the general reputation among her neighbors and acquaintances, of the plaintiff?" "Do you know whether the plaintiff has been charged with crime prior to the complaint which Mr. O'Brien made against her?" "Are you acquainted with the general reputation which the plaintiff had amongst her friends and neighbors prior to the time that Mr. O'Brien made his charge against her?" "Do you know whether, prior to the charge that Mr. O'Brien made against her, the defendant had obtained and acquired the good opinion and credit of her neighbors?" "Are you acquainted with the reputation which Mrs. Frasier had prior to Mr. O'Brien's charge against her for virtue?"

With respect to these inquiries two topics are discussed in the briefs of counsel, first, whether the general character of the plaintiff in this action was open to attack, and, second, this being answered in the affirmative, whether the interrogatories, or any of them which were addressed to the witness, were in due form.

Touching the first subject, it is conceived that when a plaintiff in a suit for malicious prosecution founds his action in part on an injury done to his character by such prosecution, the legal rule is quite settled that he thereby puts his general character in issue. As long ago as the case of Savile v. Roberts, reported in 1 Ld. Raym. 374, Lord Holt, in defining the damages which will support a suit of this character, states as his first class those instances where the only damage consists in the "injury done to a man's fame, as if the matter whereof he be accused be scandalous." It would seem to follow therefore, that whenever the action is used as a means of reparation for an injury, in whole or in part, done to his character, the plaintiff in such procedure must stand in precisely the same attitude that the actor in an action for libel or slander assumes, and in the latter class of cases, it has been adjudged in this court, that the general bad character of the plaintiff at the time of the alleged grievance is admissible on the part of the defense in mitigation of damages. The case indicated is that of Sayre v. Sayre, 1 Dutcher 235, in which Chief Justice Green reviews the English and American

decisions on this subject, and finally declares the class of evidence in question is admissible, in mitigation of damages, on the broad ground "that it cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation." It is also to be noted, in this connection, that in his discussion of this subject the accurate jurist just mentioned, evidently considered the action for malicious prosecution based upon an injury to character, as *in pari materia* with the action for libel or slander, and refers to both procedures, throughout his opinion, as resting on the same general principle. And indeed it does not seem to be deniable that a malicious prosecution for an indictable and odious offense is a libel to which is, in some cases, superadded illegal imprisonment and the loss of property, so that it would be quite abnormal for the same court to declare that in the actions for libel the plaintiff's character is in issue, but in actions for malicious prosecution it is not in issue.

And the decision just referred to appears to accord with the great weight of authority, as will plainly appear by a reference to any of the leading text-books treating of the subject. 1 Whart. Ev., sec. 54; Bacon v. Towne, 4 Cush. 217; Fitzgibbon v. Brown, 43 Me. 169.

Evidence as to the bad moral character of the plaintiff was, it is considered, plainly admissible in mitigation of damages. Whether such testimony would have been proper, if such issue had been presented on the facts as a circumstance going to make up a reasonable cause for the conduct of the defendant, is a question not now *sub judice.*

Judgment reversed.

ELTRINGHAM v. EARHARDT

67 Miss. 492. (1889)

COOPER, J. delivered the opinion of the court.

This is an action by appellee to recover damages for injuries inflicted by appellant by an assault and battery. From a verdict and judgment for two hundred dollars the defendant appeals. The principal error assigned is the action of the court in giving the sixth instruction asked by the plaintiff, which is as follows:

"The court instructs the jury that if they find for plaintiff they

have the right to take into consideration, in estimating the damages, the pecuniary condition of both the plaintiff and defendant."

It is said by counsel for appellant that there is neither principle nor authority for instructing a jury in cases of this character to take into consideration the poverty of the plaintiff.

We find no difficulty in supporting the charge upon both principle and authority. The evidence shows that the plaintiff was a poor man, dependent upon his personal labour for his support, and that by reason of the injuries inflicted upon him he was for more than two weeks unable to properly perform his duties, and yet feels the effect of the blows and kicks administered by the defendant.

In actions of this character, in which insult and mortification bear so large proportion to the injury inflicted, juries are not restricted to the actual pecuniary damages sustained. Treating of such actions, Greenleaf says: "Nor are the jury confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require."

We find no error in the proceedings. The appellant may congratulate himself upon escaping with so moderate a verdict. A very much larger one would have been supported by the evidence and would have met our hearty approval.

Affirmed.

SOUTHERN KAN. RWY. CO. v. ROBBINS.

43 Kan. 145. (1890)

Action brought against the Railway Company by Robbins, as administrator of the estate of John F. Patterson, deceased, to recover damages for the benefit of his widow and child. Judgment for the plaintiff, at the October term, 1887, for $5,500.

JOHNSTON, J. Errors are assigned her upon the rulings of the court in admitting evidence.

A witness was asked, and over objection permitted to state, as to whether the deceased was a careful and skillful railroad man. This was clearly erroneous. The question whether Patterson exer-

cised due care in this particular instance was an important issue. It was alleged that he was guilty of negligence, and it was contended that the absence of the handhold on the top of the car was an obvious danger, and apparent to anyone, and that to ascend a perpendicular ladder in the manner in which he did, by letting go his hold of the rung on the side of the car before laying hold of the rung on the top of the car, was negligence. The issue of his want of ordinary care was before the jury, and there was much testimony submitted concerning his conduct at the time of the injury. There were eye-witnesses present, who at the trial described the manner in which he ascended the ladder, and the care which he exercised at the time the accident occurred; and hence there was no necessity nor propriety in admitting the opinion of an expert as to whether he was generally a careful and skillful man. The determination of whether he was exercising due care when he fell from the car does not depend upon the care exercised by him at other times, or whether he was usually careful in the performance of his duties as a railroad man, but does depend upon his conduct at the time of the accident. The witness who gave the testimony was a conductor on the same railroad; had been acquainted with him for a year, and claimed to have the means of knowing as to whether he was a careful railroad man; and his testimony may have had much weight with the jury in determining that the deceased was in the exercise of due care. With the evidence before them as to the care he used at the time, the jury could determine better than any expert whether or not he was negligent; and the fact that he was generally careful would be unavailing if the testimony showed that his negligence in this instance contributed to the injury. Testimony of this character is no more admissible than an offer by the railroad company to show his want of care at the time of the accident by proving that he was negligent at other times, or generally careless. Exceptions are made in some cases where there are no eyewitnesses of the accident, and better evidence cannot be obtained as to whether the injured person exercised due care; but all the authorities hold such testimony to be inadmissible where the testimony of persons who witnessed the accident is available. (Bryant v. Rld. Co., 56 Vt. 710; Dunham v. Rackliff, 71 Me. 345; Hays v. Millar, 77 Pa. St. 238; Tenney v. Tuttle, 1 Allen, 185; McDonald v. Savoy, 110 Mass. 49; Chase v. Rld. Co., 19 Am. & Eng. Rld. Cases, 356; Morris v. East Haven, 41 Conn. 252; Baldwin v. Western Rld. Co., 4 Gray, 333; Cen. Rld. Co. v. Roach, 64 Ga. 635; Chicago &c. Rld. Co. v. Clark, 108 Ill. 113; same case, 15 Am.

& Eng. Rld. Cases, 26; Elliott v. Chicago &c. Rld. Co., 38 Am. & Eng. Rld cases, 62; 1 Greenl. Ev. sec. 84.)

Neither was the testimony introduced in regard to how railroad men should and do ascend the ladder of a box car relevant nor competent. The practice followed by others throws no light on the care used by Patterson in this case. It is not claimed that the opinions of experts are necessary in the case; and to allow testimony as to how others climbed the ladder, would be to create collateral issues as to the prudence of their conduct and to unnecessarily protract the trial. The question of whether Patterson was guilty of such negligence as would preclude a recovery, was an issue before the jury, and the practice or usage of others would not tend to prove care on his part; and such testimony should not have been received. (Chicago, &c., Rld. Co. v. Clark, *supra;* Lawrence v. Hudson, 12 Heisk. 671; Chicago, &c. Co. v. Moranda, 108 Ill. 576; Rly. Co. v. Evansich, 61 Tex. 3; Bryant v. Rld. Co., *supra;* Bailey v. New Haven, &c. Co., 107 Mass. 496; Koons v. Rld Co., 65 Mo. 592; Crocker v. Schureman, 7 Mo. App. 358; Cleveland v. Steamboat Co., 5 Hun. 523; Lawson on Usages, 328.)

To account for the fall, a witness, who was not present at the time gave the following testimony:

"Q. You say you have passed over this road a great many times? A. I have.

"Q. And over this bridge? A. Yes, sir.

"Q. Now, can you state to the jury, under the circumstances which surrounded Mr. Patterson there, whether or not there was any cause why he should have ascended that car with great speed and haste, and if so, what that cause was? Explain to the jury. A. Well, the way that man started in to go up the side of the car, he couldn't see the bridge when he started; and at the speed the train was running, and him climbing up the side of the car, by the time the engine struck the bridge he would be towards the top, and when he heard the thundering noise that the engine makes when it strikes a bridge, and he hurried to get on top of the car."

This testimony was given over the objection of the plaintiff in error. The witness was the conductor of another train, who was far away when Patterson fell from the box car. He did not know and could not state whether Patterson could see the bridge when he started to ascend the ladder, nor how far he had ascended when the bridge was reached; neither was he competent to state what causes

operated on the mind of Patterson that led him to ascend the ladder with great speed and haste.

The admission of the incompetent testimony was error, for which the judgment will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

GERTZ v. FITCHBURG R. R. CO.

137 Mass. 77. (1884)

Tort, for personal injuries received by the plaintiff while in the defendant's employ. At the trial in the Superior Court, before Aldrich, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the exclusion of certain evidence, which appears in the opinion.

HOLMES, J. In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction in 1876, in the United States District Court, of the crime of falsely personating a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded, subject to his exception.

We think that the evidence of his reputation for truth should have been admitted, and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held inadmissible, for instance to rebut evidence of contradictory statements; Russell v. Coffin, 8 Pick. 143; Brown v. Mooers, 6 Gray, 451; or where the witness is directly contradicted as to the principal fact by other witnesses. Atwood v. Dearborn, 1 Allen, 483.

In such cases, it is true that the result sought to be reached is the same as in the present,—to induce the jury to disbelieve the witness. But the mode of reaching the result is different. For, while contradiction or proof of contradictory statements may very well have the incidental effect of impeaching the character for truth of the contradicted witness in the minds of the jury, the proof is not directed to that point. The purpose and only direct effect of the evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left un-

touched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general good character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence.

On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilb. Ev. (6th ed.) 126.

The conviction in the United States District Court was for a felony punishable with imprisonment (U. S. St. of March 2, 1867, sec. 28) and, assuming that it stands on the same footing as a conviction in another State, it would have been admissible, according to the dicta in our cases, independently of statute, not to exclude the witness, but to impeach his credit. Commonwealth v. Green, 17 Mass. 515, 541. Commonwealth v. Knapp, 9 Pick. 496, 511. Utley v. Merrick, 11 Met. 302. See Rev. Sts. c. 94, sec. 56. And when a conviction is admitted for that purpose, it always may be rebutted by evidence of good character for truth. Commonwealth v. Green, *ubi supra*. Russel v. Coffin, 8 Pick. 143, 154. Rex v. Clarke, 2 Stark, 241. Webb v. State, 29 Ohio St. 351.

It is true that a doubt is thrown upon this doctrine in Harrington v. Lincoln, 4 Gray, 563, 568; but that case was decided on the ground that the cross-examination which showed that the witness had been charged with a crime also showed that he had been acquitted, and cannot be regarded as an authority against our decision, whether the *ratio decidendi* adopted be reconcilable with later cases or not. Commonwealth v. Ingraham, 7 Gray, 46.

The applicability of the foregoing reasoning is made clear by the language of our statutes. By the Pub. Sts. c. 169, sec. 19, the only purpose for which conviction of a crime may be shown, in any case, is to affect credibility. Even if the conviction proved here would have excluded the witness but for the statute cutting down its effect, it could not be maintained that evidence of reputation for truth re-

mained inadmissible because it would have been so when the witness was excluded. The statute puts all convictions of crime on the same footing,—those which formerly excluded, those which always have gone only to credibility, and it would seem, those which formerly would not have been admissible at all. (We assume that the words "a crime" in the Pub. Sts. c. 169, sec. 19, mean the same as "any crime" in the St. of 1870, c. 393, sec. 3. Gen. Sts. c. 131 sec. 13. Sts. 1852, c. 312, sec. 60; 1851, c. 233, sec. 97. Commonwealth v. Hall, 4 Allen, 305.) And therefore any evidence which was admissible to rebut a conviction that only discredited before the statute, must now be admissible to rebut all convictions that may be put in evidence. Whether any different rule would apply when the fact is only brought out on cross-examination we need not consider.

The exception to the exclusion of evidence that the witness was innocent of the offense of which he was convicted, and explaining why he was convicted, is not much pressed, and is overruled. Commonwealth v. Gallagher, 126 Mass. 54.

COMMONWEALTH v. O'BRIEN.

119 Mass. 342. (1876)

Indictment charging the defendant with an assault on July 7, 1875, on James M. Ellis, with a certain dangerous weapon, to wit, with a knife, with the intent to kill.

During the trial the defendant called several witnesses, who testified to the fact that the defendant had the reputation of being a peaceable and quiet person. The defendant did not testify in the case. After the evidence for the defense was closed, the government called one Davis, an officer, and offered to show by him that the defendant was one of four defendants named in an indictment for an assault upon one John Walsh. The defendant objected, but the judge admitted the evidence, and the defendant excepted.

ENDICOTT, J. The defendant called witnesses who testified to his general reputation as a peaceable and quiet citizen. The government was then allowed to prove that the defendant had been indicted for an assault, and to put in evidence an indictment, wherein he was with other persons, indicted for an assault upon one John Walsh. To this indictment it appeared that the defendants pleaded not guilty;

two days afterwards satisfaction was filed, and on the day following the plea was retracted by the defendants, and they pleaded guilty. The indictment was then placed on file on payment of costs, which were paid, but no sentence was passed. The evidence thus admitted to meet evidence of general reputation, was, in substance, that the prisoner had committed another assault, and had in court admitted or confessed the same by a plea of guilty. And the question is, can a particular fact be proved to rebut evidence of a general reputation.

Where a party undertakes to show that his reputation is good, or that the reputation of the other party or witness is bad, he cannot put in evidence of particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts for the reason that a particular fact does not necessarily establish a general reputation or fairly meet the issue presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge. Peterson v. Morgan, 116 Mass. 350.

In Commonwealth v. Hardy, 2 Mass. 303, 318, it was said by Chief Justice Parsons: "It is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." See Commonwealth v. Sackett, 22 Pick. 394; Commonwealth v. Webster, 5 Cush. 295.

In a case heard before all the judges of England, it was held that if evidence of good character is given in behalf of the prisoner evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation is inadmissible. Chief Justice Cockburn, in delivering the opinion of the court, says: "The only way of getting at it (his character) is by giving evidence of his general character founded on his general reputation in the neighborhood in which he lives." "It is quite clear that, as the law now stands, the prisoner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbors. So, too, evidence of antecedent bad conduct would form equally good ground for inferring the prisoner's guilt, yet it is quite clear evidence of that kind is inadmissible." * * *

It is true that upon cross-examination of a witness, testifying to general reputation, questions may be put to show the sources of his information, and particular facts may be called to the witness's attention, and he may be asked if he ever heard of them; but this is allowed not for the purpose of establishing the truth of these facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony. Leonard v. Allen, 11 Cush. 241. Rex v. Martin, 6 C. & P. 562. So in actions for slander, evidence of general bad character of the plaintiff may be put in evidence in mitigation of damages; and where the plaintiff alleges that the defendant has slandered him in a particular respect, as for thieving, the defendant may put in evidence for the same purpose that the plaintiff's general reputation in that respect is also bad. Clark v. Brown, 116 Mass. 504. But we are not aware of any case, where the defendant upon that issue has been allowed to prove a particular act of theft.

We are of opinion therefore that the learned judge erred in admitting this evidence. The government was entitled to rebut the evidence of the defendant, he having put his character in issue, but could not do so by proof of another assault.

Exceptions sustained.

REGINA v. RODEN.

12 Cox Cr. Ca. 630. (1874)

Prisoner was indicted for the murder of her child Clara Roden.

Counsel for the prosecution tendered evidence to prove that the prisoner had had four other children who had also died in infancy at early ages. He cited Reg. v. Cotton (12 Cox Cr. Ca. 400), where a prisoner was charged with the murder of her child by poison, and the defense was that its death resulted from an accidental taking of such poison; evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.

Rose objected. The evidence tendered, although of no real legal value, would, if given, greatly prejudice the case in the minds of the jury. That admitted in Reg. v. Cotton pointed directly to prior acts

of poisoning, but here it is not proposed to prove that the four children died from other than natural causes.

LUSH, J. The value of the evidence cannot affect its admissibility. The principle of Reg. v. Cotton applies. The Lord Chief Justice and I were consulted upon the point in that case by my brother Archibald before the trial, and, having considered it, we were clearly of opinion that the evidence was admissible. I think the evidence now tendered may likewise be received.

Verdict—Not Guilty.

HATT v. MAY.

144 Mass. 186. (1887)

Tort for personal injuries occasioned to the plaintiff while at work with a pile driver in the defendant's employ. At the trial in the Superior Court, before Thompson, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

DEVENS, J. The plaintiff, while in the defendant's employ, was injured through the alleged negligence of the defendant's foreman. He was permitted to put in evidence that the foreman's reputation for competency was bad. As the defendant was bound to use due care, both in procuring and retaining a suitable person as the foreman in his employ, this evidence was properly admissible. The plaintiff desired further to put in testimony as to certain specific acts of carelessness on the part of the foreman, while engaged on the same job, and before the accident happened. This was properly excluded. Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skillful workman, and properly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would necessarily have a tendency to continue the case by collateral inquiries, to protract it indefinitely if those inquiries were carefully made, and to mislead and distract a court or jury from the true issue. Robinson v. Fitchburg & Worcester Railroad, 7 Gray, 92. Maguire v. Middlesex Railroad, 115 Mass. 239.

Exception overruled.

ADMISSIONS AND CONFESSIONS.[1]

SMITH v. PALMER.

60 Mass. 513. (1850)

This was an action of assumpsit, in which the plaintiff declared originally on the common counts, and on an account annexed for an order drawn by the plaintiff in favor of the defendant on one George C. Goodwin, for matches, and paid for by him, and for money furnished by the plaintiff to the defendant.

FLETCHER, J. Besides the exception in regard to the amendment, the case presents two other exceptions to the ruling of the judge. The new count set out a contract of the defendant, to discontinue the suit in Maine, and alleged as a breach, that the defendant did not discontinue, but prosecuted the suit to judgment and execution, and that the plaintiff had been compelled to pay the amount recovered. Upon the trial, the plaintiff was permitted to give in evidence in support of the allegations in the writ of the pendency of the suit in Maine, of the failure of the defendant to discontinue it, and of the prosecution of the suit to judgment and execution, the oral declarations, confessions, and admissions of the defendant, connected with a certain paper writing, purporting to be an execution issued in said action, and an assignment thereon executed by the defendant. The defendant then requested the judge to rule that the plaintiff could not maintain his case on the special count, without producing a certified copy of the judgment, or accounting for its non-production, so as to let in secondary evidence. But the court refused so to rule, and instructed the jury, that the foregoing evidence, though not the most satisfactory, was yet important evidence for their consideration, on the question submitted to them under the special counts in the declaration. To this ruling and instruction the defendant excepted.

The doctrine maintained by the defendant's counsel, and the authorities cited, are no doubt correct, but do not apply to the case. The case of Sheldon v. Frink, 12 Pick. 569, was an attempt to prove a record by parol, by a witness on the stand. But this evidence was most properly rejected. A record cannot be proved by parol, by a witness on the stand; nor can the contents of any paper be proved, without the production of the paper, if the paper can be produced.

But this doctrine does not apply to the present case, this is a case of the admission of a party, and the admission of a party stands on

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1 Hughes on Evidence, pp. 21 and 44.

distinct grounds. The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus, the statements of a party, that certain land had been conveyed, might be admitted, though the conveyance must be by deed recorded.

The general principle, as to the production of written evidence as the best evidence, does not apply to the admissions of parties; as what a party admits against himself may reasonably be taken to be true. The weight and value of the statements and admissions will vary according to the circumstances and must be determined by the jury. The ruling of the judge in the court below on this point is well supported by the authorities. See the case of Slatterie v. Pooley, 6 M. & W. 664, where the distinction between the admissions of parties, and parol statements from other sources, as to written instruments, is fully explained and supported. The general doctrine is also found in 1 Greenl. Ev. secs. 96 and 97 and cases cited therein. In the present case, the principal fact was, that the defendant had not performed his contract, in regard to which there could be no doubt that his admission would be important evidence, and the execution reciting the judgment assigned by the defendant himself was produced, in connection with the admissions and statements of the defendant.

Exceptions overruled.

PEOPLE v. McMAHON.

15 N. Y. 384. (1857)

Writ of error to the Supreme Court. The appellant was tried at the Rensselaer Oyer and Terminer, upon an indictment for the murder of his wife. On the day after the alleged murder, McMahon was arrested by a constable without warrant, as the probable murderer. He was taken in the custody of the officer before a coroner then holding an inquest upon the body of the deceased woman, and was sworn and examined as a witness, and immediately thereafter was

committed to jail. Upon the trial his testimony thus taken was read in evidence against him. At the time the evidence was received, it was not known that the prisoner was charged with the crime when sworn and no objection was taken to its admission, but upon the facts appearing in the course of the trial, the prisoner's counsel moved to strike out the evidence, and the court refusing so do do, took an exception. This was the only error alleged to have been committed. The prisoner was convicted and sentenced. A bill of exceptions was made and the case taken upon writ of error to the Supreme Court, which affirmed the judgment of the Oyer and Terminer, and the cause was thereupon brought to this court by writ of error.

SELDEN, J. Confessions and statements, made by persons charged with crime, have been very differently regarded by the civil and the common law. The former, reposing with confidence upon the assumption that one who is innocent will never admit that which tends to show guilt, treats the declarations and admissions of the accused as evidence of the most satisfactory kind. To such an extent does it carry this idea, that in all except capital cases a confession by the accused is deemed conclusive evidence of guilt, unless met by overwhelming proof to the contrary. (Domat's Civil Law, sec. 2086, Cushing's ed.)

The common law, on the other hand, with, as I think, a truer philosophy and better appreciation of the nature and operations of mind, regards this species of evidence with distrust. It carefully scrutinizes the circumstances, and rejects the evidence if it sees that no safe inferences can be drawn from it. The first distinction which it makes is between a declaration or statement made before, and one made after, the accused was conscious of being charged with or suspected of the crime. If before, it is admissible in all cases, whether made under oath or without oath, upon a judicial proceeding or otherwise; but if made afterwards, the law becomes at once cautious and hesitating; the inquiry then is, was it voluntary? For unless entirely voluntary, it is held not to be admissible.

In order to apply this rule it is necessary to know what is meant by the terms voluntary. The word is evidently not in all cases used in contradistinction to compulsory; because a confession obtained by either threats or promises, from any one having authority over the accused or concerned in the administration of justice, is uniformly held to be inadmissible. However slight the threat or small the inducement thus held out, the statement will be excluded as not voluntary. It is plain therefore that, in such cases at least, by voluntary

is meant, proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause.

The principle upon which this rule is based is obvious. It is, that we cannot safely judge of the relation between the motives and the declarations of the accused, when to the natural agitation consequent upon being charged with crime is superadded the disturbance produced by hopes or fears artificially excited. It is because it is in its nature unreliable, and not on account of any impropriety in the manner of obtaining it, that the evidence is excluded. In this all the authorities agree. Mr. Phillips, speaking on this subject, says: "A confession so obtained cannot be received, on account of the uncertainty and doubt whether the prisoner might not have been induced, from motives of fear or interest, to make an *untrue statement.*"

The case of Rex v. Warickshall (1 Leach C. C., 263) affords a strong test of this doctrine. The prisoner had made a confession which was held to be inadmissible; but this confession had led to the discovery of other facts sufficient to convict. Her counsel contended that, the confession being inadmissible, facts discovered by means of it must be equally so; and if the confession was excluded, not as unreliable, but as having been improperly obtained, or on account of any supposed violation of the public faith, as was there contended, the argument would have been unanswerable. The evidence, however, was received, and the court say: "Confessions are received in evidence or rejected as inadmissible, under a consideration whether they are or are not *entitled to credit.*" (See also Rex v. Butcher, note to Warickshall's case; Rex v. Lockhart, 1 Leach C. C. 386; Regina v. Gould, 9 Car. & Pa. 364.)

The doctrine of the American courts is the same. In the case of Commonwealth v. Knapp (9 Pick. 496), Morton, J., speaking of the grounds upon which the statements of prisoners are excluded are not voluntary, after remarking that it is not because their admission would be a breach of good faith, nor because they have been illegally extorted, says: "but the reason is that, in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage or fear of injury to state things which are *not true.*"

Judgment reversed and new trial ordered.

COMMONWEALTH v. MYERS.

160 Mass. 530. (1894)

Indictment, for the larceny of two whiffletrees, the property of Edwin V. Kinsley, on September 22, 1893, at Canton. Trial in the Superior Court, before Bond, J., who allowed a bill of exceptions, in substance as follows.

The government offered in evidence an alleged confession of the defendant to one Richard Vanston, a police officer in the town of Stoughton. The officer testified that he made the arrest of the defendant and one Sylvester, who was joined with the defendant in the indictment, upon the night of October 2, 1893; that he took the defendant to the lock-up in Stoughton; and that the defendant at first denied any knowledge of the alleged larceny. The officer further testified, that having the defendant in his custody in the lock-up, "I told him he had better tell the truth." The confession alleged to have been made to the officer at that time was thereupon excluded.

The government then called Edwin V. Kinsley, the owner of the property, who testified that he was present the next day, October 3, in the District Court of Southern Norfolk, when the defendant was arraigned; that the defendant was in the dock, and was asked whether he was guilty or not guilty, and he said "he did not know anything about the whiffletrees"; that Vanston, the officer to whom it was alleged the defendant made the confession the night before, thereupon asked the defendant "if he was not there when they were taken, and he said he was there, but did not go into the barn"; that the officer then asked him, "Didn't you stay outside?" and he said, "Yes"; and that he then asked him "if he waited for Sylvester to bring out the stuff and went with him and hid them up," and he said, "Yes."

The defendant objected to the admission of Kinsley's testimony, as above stated, but the judge admitted it; and the defendant excepted.

There was no other evidence to connect the defendant with the crime.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

MORTON, J. The exclusion of the confession made to Vanston on the night of the arrest was correct. Commonwealth v. Nott, 135 Mass. 269. Commonwealth v. Preece, 140 Mass. 276. The point now is whether the questions to the defendant by the same officer, and the defendant's answers thereto the next day in the District Court, as tes-

tified to by a witness who heard them, were rightly admitted. It may be fairly assumed that the defendant was, to some extent at least, induced to answer as he did by Vanston's knowledge derived from what he had himself told him. But the question is whether the answers were voluntary or were made under the influence of what the officer had told him the night before when he said to him that he had better tell the truth.

At the time of making the answers the defendant had been arraigned, and was in open court. It does not appear at what time of the night he was arrested, or at what time of day he was arraigned. But a number of hours had passed since the remark of the officer, and he had had abundant opportunity for reflection and consideration. When asked if he was guilty or not guilty, instead of answering directly, he said voluntarily that "he did not know anything about the whiffletrees." Thereupon, in the presence of the justice, and without objection from him the officer asked the questions, and the defendant made the answers, which were testified to. No indictment was then held out to him. He was not obliged to answer if he did not choose to. He could have applied to the court, if he had seen fit, for protection. He did not do so. He appears to have answered the questions freely, voluntarily, and truthfully, and so far as the evidence discloses without relying upon or even remembering the words of the officer the night before. Confessions are not to be excluded because they are the admissions of a person charged with the commission of a crime, but only where the circumstances are such under which they are made that a reasonable presumption arises that they may have been induced by a promise or threat from one in authority, and consequently are open to the objection that they may not be true. Commonwealth v. Sego, 125 Mass. 210, 213. Commonwealth v. Preece, *ubi supra*. There are many cases in which confessions made originally under the influence of a promise or threat, and then repeated, have been excluded, because of the presumption that, under the circumstances of the case, the party in making them was influenced by the original promise or threat. There are also many cases where such confessions have been admitted on the ground that there was no reasonable presumption that the threat or promise operated to induce them. It would serve no useful purpose to attempt to review, or consider, or reconcile all of these cases, if that were possible. For a collection of them, see 3 Am. & Eng. Encyc. of Law, 439 *et seq.* We think that this case comes within the latter class, and that the circumstances were not such as to afford a reasonable presumption

that the defendant's answers were influenced by the remark made to him by Vanston, and that therefore they must be regarded as made voluntarily. If they had been made to another officer, we presume no question would have been raised as to their admissibility. We do not think that, under the circumstances, the fact that they were made to the same officer to whom the original confession was made, and who then held out the inducement, renders them incompetent. See Commonwealth v. Morey, 1 Gray, 461; Commonwealth v. Whittemore, 11 Gray, 201; Commonwealth v. Cuffee, 108 Mass. 285; Commonwealth v. Crocker, 108 Mass. 464; Commonwealth v. Mitchell, 117 Mass. 431; 432; Commonwealth v. Smith, 119 Mass. 305; Commonwealth v. Sego, 125 Mass. 210, 213; Commonwealth v. Flagg, 135 Mass. 5451.

STATE v. KORNSTETT.

62 Kan. 221. (1900)

The opinion of the court was delivered by

JOHNSTON, J. John Kornstett was charged with and convicted of the murder of his cousin, Nora Kornstett, and the severest penalty of the law was adjudged against him. In substance, the information charged the appellant with having attempted to ravish his cousin, and that then, with deliberation and premeditation, he choked and beat her and struck her head against a tree with great violence, and afterward he threw her body into a well about twenty feet deep all with intent to kill and murder her, and that the wounds and injuries so purposely and feloniously inflicted caused her death.

Proof of confessions made by the defendant was received in evidence over his objections, and upon these rulings error is assigned. About the time of his arrest he was closely questioned by the sheriff, who believed the defendant was connected with the commission of the offense, and before admitting his guilt he was told that some of his prior statements had been found to be untrue. He finally acknowledged his guilt to the sheriff, giving the circumstances in considerable detail, and he afterward repeated the confession to a number of other persons. He knew that suspicion was directed toward him, and that there was considerable excitement in the community because of the brutal character of the crime, but the sheriff, to whom

the confession was first made, testified that it was not given by reason of any threat made or promise held out. While the defendant claimed that he was induced by the pressure of fear and hope to make the admission, the sheriff states that he told the defendant that he believed the defendant knew who committed the offense, and that he would better tell all he knew about it; and that if he was guilty it would be better for him to admit the truth, and that if he was innocent he should stick to it regardless of the suspicion against him, and that he, the sheriff would protect him. It is claimed and the defendant testified, that hope was held out to him that the punishment for the offense would be confinement in the reform school or reformatory, but this is expressly denied by the sheriff, although he does state that in response to an inquiry by the defendant he explained to him the character of those institutions. It is well settled that an extra-judicial confession will not be received in evidence unless it has been freely and voluntarily made. If it has been extorted by fear or induced by hope of profit, benefit, or amelioration, it will be excluded as involuntary. However, mere advice or admonition to the defendant to speak the truth, which does not import either a threat or benefit, will not make a following confession incompetent. According to the testimony of the sheriff, the confession was admissible; and the fact that the defendant confessed so freely and frequently to others at different places and times and under varying circumstances appears to sustain the sheriff.

The judgment is affirmed.

REX v. DERRINGTON.

2 Car. & P. 650. (1826)

The prisoners were indicted for a burglary in the house of Mr. George Simcox.

For the prosecution, a letter written by the prisoner Derrington was offered in evidence. It appeared, that, after Derrington was committed to Stafford jail on this charge, he asked the turnkey if he would put a letter into the post; he promised to do so, and the prisoner gave him the letter in question, which was addressed to the prisoner's father; but instead of putting the letter into the post, the

turnkey gave it to the visiting magistrates of the jail, who sent it to the prosecutor.

GARROW, B. I am clearly of opinion that in point of law, this letter is admissible in evidence. I remember, many years ago, making this very objection before the late Mr. Justice Gould, who overruled it. The only cases in which what a prisoner says or writes is not evidence are two; 1st, where the prisoner is induced to make any confession in consequence of the prosecutor, &c., holding out any threat or promise, to induce him to confess; and 2ndly, where the communication is privileged, as being made to his counsel or attorney. This not being either of those cases, I must receive the evidence.

Verdict—Guilty.

STATE v. MITCHELL.

61 N. C. 447. (1868)

Murder, tried before Warren, J., at a Court of Oyer and Terminer for Lenoir, held on the first Monday in August, 1867.

The prisoner had been arrested by the military authorities of the United States, for the murder of one James B. Allen, without being informed of the charge against him. Upon the trial the State offered evidence of his confessions made in prison to one Cook, who was at that time also a prisoner, for a misdemeanor, and had previously been his acquaintance.

They were made under the following circumstances. The prisoner asked the witness, What in the hell do you suppose I was arrested for? Witness replied that he did not know. After some other conversation, the prisoner said, If you will not tell me I will tell you something. Witness said he would not tell, but if he did, it would make no difference, for one criminal could not testify against another. The prisoner then said, I want to know what to do; and witness replied that if he knew the circumstances he could tell him what to do.

Objection was made to the reception of the confessions thereupon made by the prisoner, on the ground that they were improperly and illegally obtained. They were however received by the court.

The prisoner was convicted, and a rule having been obtained for a new trial it was discharged, and there was judgment and appeal.

BATTLE, J. The only question presented by the bill of exceptions is, whether the confession of the prisoner was admissible.

The principle upon which the competency of the confession of a prisoner depends was well stated by Judge Henderson, in the case of the State v. Roberts, 1 Dev. 261. He said, "confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man not operated upon by other motives more powerful with *him*, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected." This principle thus clearly enunciated by a very able judge, will be found to have pervaded every case upon the subject which has been decided by this court. See Battle's Digest, Title Evidence, sec. xxvi, p. 505.

The confession proposed to be proved in the present case must be regarded as coming under the head of voluntary confessions. The prisoner himself commenced the conversation which led to his confession. When the prisoner said to the witness, "I want to know what to do," he must have been aware that the witness could not tell him without knowing the circumstances of his case. When the latter told him so, therefore, he only told him that which he already knew; and what he, thereupon went on to state to the witness was not induced by any hope of advantage held out to him by the witness, but by the suggestion of his own mind to get the witness' advice as to the course he ought to pursue. So far from being under any influence to make a false statement, he had the strongest motive to tell the truth, so that the advice of his acquaintance might be of service to him. In view of the question, the mistake of the witness as to the law about one prisoner testifying against another, cannot make any difference. The prisoner could not thereby have been in the least induced to make a false statement of the facts and circumstances of his case. All that can be said is, that he found himself placed in a difficult and dangerous position, and wanted the advice of a friend as to the best course to be pursued for his relief. To obtain that advice he voluntarily unbosomed himself to a person who he thought might be trusted, but who afterwards proved treacherous and disclosed his secret. We do not know of any such ground for excluding confessions, and think the Judge was right in admitting them.

It must be certified that we find no error in the record. PER CURIAM.

No Error.

THE QUEEN v. THOMPSON.

2 Q. B. D. 12. (1893)

Case stated by the acting chairman of quarter sessions for the county of Westmoreland.

At the Westmoreland Quarter Sessions, held at Kendal on Oct. 21, 1892, Marcellus Thompson was tried for embezzling certain moneys belonging to the Kendall Union Gas and Water Company, his masters.

Mr. Crewdson, the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued was called as a witness by the prosecution to prove among other things a confession by the prisoner.

As soon as this confession was sought to be put in evidence, objection was taken to its admissibility, and we therefore, before receiving further proof, allowed the witness to be cross-examined by the prisoner's counsel. In answer to the latter's questions, the witness stated that, prior to the confession being made, the prisoner's brother and brother-in-law had come to see him, and that at this interview he said to the prisoner's brother, "it will be the right thing for Marcellus to make a clean breast of it." The witness added "I won't swear I did not say 'It will be better for him to make a clean breast of it.' I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken." No evidence was produced to the court tending to prove that the details of the interview had been communicated to the prisoner, or to rebut the evidence of Mr. Crewdson as to what took place at the interview.

It was then contended by the prisoner's counsel that the above statements to the prisoner's brother were inducements to the prisoner to confess, held out by a person in authority, and that evidence of the confession was therefore inadmissible.

The prisoner was convicted and sentenced to three years, penal servitude.

The question for the opinion of the court is whether the evidence of the confession was properly admitted.

CAVE, J. The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions; and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted.

Many reasons may be urged in favor of the admissibility of all confessions, subject of course to their being tested by the cross-examinations of those who heard and testify of them; and Bentham seems to have been of this opinion (Rationale of Judicial Evidence, Bk. v. ch. vi, s. 3). But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his Law of Evidence (8th ed. Part 2, ch. 15, s. 872), "Before any confession can be received in evidence in a criminal case, it must be shewn to have been voluntarily made; for, to adopt the somewhat inflated language of Eyre, C. B., 'a confession forced from the mind by flattery of hope or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore, it is rejected:' Warickshall's Case. (1) The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence of this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession."

In the present case the magistrates appear to have intended to state the evidence which was before them, and to ask our opinion whether on that evidence they did right in admitting the confession. Now there was obviously some ground for suspecting that the confession might not have been free and voluntary; and the question is whether the evidence was such as ought to have satisfied their minds

that it was free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it. The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected that what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement, that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether any and if so, what communication was actually made to the prisoner, before the magistrates could properly be satisfied that the confession was free and voluntary.

The magistrates go on to say that they inferred that the details of the interview would be, by which I suppose they intend to say that they inferred they were, communicated to the prisoner, which seems to have been the right inference to draw under the circumstances. They add that they found, as a fact, that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary. The first of these findings, if the ruling of Pollock, C. B., in Reg. v. Baldry (1) is, as I take it to be, correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and if it is an independent finding, is not warranted by the evidence; and, as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that in my judgment it was not. Taking the words of Mr. Crewdson to have been, "It will be the right thing for Marcellus to make a statement," and that those words were communicated to the prisoner, I should say that the communication was calculated in the language of Pollock, C. B., to lead the prisoner to believe that it would be better for him to say *something*. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation.

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It

is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession;—a desire which vanishes as soon as he appears in a court of justice. In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate; but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by magistrates.

LORD COLERIDGE, C. J., HAWKINS, DAY and WILLS, JJ., concurred.

Conviction quashed.

STATE v. RUSH.

95 Mo. 199. (1888)

BRACE, J. The defendant was jointly indicted in the Circuit Court of Jasper County with one Seth Beard for the crime of robbery in the first degree, and on his motion was granted a separate trial; his motion to quash the indictment having been overruled, he was tried, found guilty, and his punishment assessed at imprisonment in the penitentiary for a term of ten years, and he was sentenced accordingly; his motion for new trial and in arrest of judgment having been overruled he appealed, and assigns for error that the court overruled his motion to quash the indictment, admitted incompetent evidence, refused proper and gave improper instructions, failed to declare all the law of the case, and refused to grant a new trial for the improper conduct of the sheriff and jury.

Sheriff Bailey, sworn as a witness on behalf of the state, was permitted, over the objections of the defendant, to testify to a conversation he had with the defendant in which he made certain criminating admissions, after answering the following preliminary questions: Q. "Did you have the defendant in your custody at that time? A. Yes." Q. "Was that confession about getting the money from Pirtle made after you had told Rush that Seth Beard had given him away? A. Yes." E. S. Pike, who arrested the defendant in Kan-

sas and brought him back to Jasper county, was present at the same conversation and testified in regard to it. He was also permitted to testify, over the objection of the defendant, to the following conversation had with defendant on the way back: "I told him I was satisfied that he was connected with the case, and he said he was not guilty himself, but knew who was." These admissions of the defendant were made to an officer having him in custody, but it appearing that they were not induced by any promise of benefit or favor, or threat or disfavor, or intimidation, connected with the subject of the charge, made or held out by such officer, such admissions were voluntary and admissible in evidence. State v. Simon, 50 Mo. 370. It does not appear whether the statement made by the sheriff, "that Seth Beard had given him away," was true or false, but even if it was false and the defendant made the admissions under the mistaken supposition that the co-defendant had divulged facts in relation to the crime, this would not have rendered them inadmissible. State v. Jones, 54 Mo. 478; State v. Phelps, 74 Mo. 128.

On the whole record we find no reversible error, and the judgment is affirmed. All concur.

DAVIS v. COMMONWEALTH.

95 Ky. 19. (1893)

BENNETT, C. J. The appellant having been convicted of the crime of murdering Viona Pack by the Lawrence Circuit Court, he appeals and complains as follows: First, that the court erred in not allowing him to prove by G. W. Miller that Granville Pearl confessed to him on his death-bed that he, Pearl, killed Viona Pack. It seems to us that admissions and confessions as to competency stand upon the same footing. Admissions cannot be used in evidence, except against the persons making them in an issue between him and another person, wherein the truth of the admissions is involved, or against his privies claiming through him. And confessions are incompetent evidence except against a person charged with crime, or, in a proper state of case, against his confederates. Nor is the proposed evidence competent as a dying declaration because such evidence is only competent when it comes from a declarant whose personal injuries by another have resulted in death, and the declarations must be confined to the manner and circumstances of the injury and to the person that did it.

Judgment affirmed.

THE RULE AGAINST HEARSAY.[1]

MIMA QUEEN AND CHILD v. HEPBURN.

7 Cranch. (U. S.) 291. (1813)

MARSHALL, CH. J. This was a suit instituted by the plaintiffs in the Circuit Court of the United States for the County of Washington, in which they claim freedom. On the trial of the issue certain depositions were offered by the plaintiffs, which were rejected by the court and exceptions were taken. The verdict and judgment being rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error, and the case depends on the correctness of the several opinions given by the Circuit Court.

The first opinion of the court to which exception was taken was for the rejection of part of the deposition of Caleb Clarke, who deposed to a fact which he had heard his mother say she had frequently heard from her father.

The second exception is to the opinion overruling part of the deposition of Freeders Ryland, which stated what he had heard Mary, the ancestor of the plaintiffs, say respecting her own place of birth and residence.

The fifth exception is substantially the same with the second.

These several opinions of the court depended on one general principle. The decision of which determines them all. It is this: *That hearsay evidence* is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.

However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule then which the court shall establish in this cause will not, in its application be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years ago.

It was very justly observed by a great judge that "all questions upon the rules of evidence are of vast importance to all orders and

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1 Hughes on Evidence, p. 51.

degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they were founded."

One of these rules is, that "hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, or prescription of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact.

It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule; the value of which is felt and acknowledged by all.

If the circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.

This subject was very ably discussed in the case of the king against the inhabitants of Eriswell, where the question related to the fact that a pauper had gained a residence, a fact which it was contended might be proved by hearsay evidence. In that case the court was divided, but it was afterwards determined that the evidence was inadmissible.

This court is of the same opinion.

The general rule comprehends the case, and the case is not within any exception heretofore recognized. This court is not inclined to extend the exceptions further than they have already been carried.

There is no error in the proceedings of the Circuit Court and the judgment is affirmed.

DUVALL, J. The principal point in this case is upon the admissibility of hearsay evidence. The court below admitted hearsay evidence to prove the freedom of the ancestor from whom the petitioners claim, but refused to admit hearsay of hearsay. This court has decided that hearsay evidence is not admissible to prove that the ancestor from whom they claim was free. From this opinion I dissent.

In Maryland the law has been for many years settled that on a petition for freedom where the petitioner claims for an ancestor who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the general court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of Appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct.

Notes. The three chief reasons for excluding hearsay testimony are, (1) the original statement is not made under oath; (2) no opportunity is given the adverse party to cross-examine the person who made the original statement; (3) no opportunity is given the jury to observe his demeanor when making it.

The rule against hearsay is restricted to statements used testimonially. Thus, in the celebrated Harry K. Thaw murder case letters written by Stanford White, the deceased, to Thaw's wife were admitted because the purpose in introducing them was not testimonial. It was to show the jury inferentially the effect of the letters in producing in Thaw's mind a "brainstorm."

A few classes of statements are characterized as exceptions to the rule against hearsay. They include statements pertaining to general reputation, market values, what was said, etc. As a general rule, however, these constitute original evidence.

Several of the so-called exceptions to the rule against hearsay are in fact independent rules. Their origin antedates that of the rule against hearsay. Thus, account-book entries and entries made in the regular course of business were held admissible in evidence long before the rule against hearsay came into existence.

FORMER EVIDENCE.[1]

YALE v. COMSTOCK.

112 Mass. 267. (1873)

Complaint under the mill act. Trial in the Superior Court, before Dewey, J., after a verdict for the respondent, allowed the complainant's bill of exceptions, from which it appeared that the complainant derived his title by deed from Allen S. Yale, July 31, 1871.

The respondent derived his title by deed from Marshall Brace, Feb. 26, 1868, and claimed a prescriptive right to maintain his dam at the height it was maintained during the time covered by this complaint.

It appeared that a mill and dam, for the working of the same, had been maintained, by those under whom the respondent derived his title, since the year 1843, on the same site as at present, and that in the year 1863, Marshall Brace being then the owner of the respondent's dam and mill, and Allen S. Yale of the land now owned by the complainant, the dam was in various respects altered and rebuilt, and a material point in issue in the present case was whether, when Brace altered and rebuilt the dam, the new dam was made higher than the old one. It was agreed that Brace had since died.

The respondent called L. H. Gamwell, Esquire, who testified that as a master in chancery, under the order of the Supreme Judicial Court, he took the testimony of various witnesses in the suits in equity of Brace v. Yale, and Yale v. Brace, 99 Mass. 488, and that he took the testimony of Marshall Brace; that the counsel of both parties were present as well as the parties during the whole time; that the testimony was given in answer to interrogatories and cross-interrogatories, and taken in narrative form by the consent of the counsel, read to the witnesses carefully, and if any corrections were made they were entered, that after having made such corrections, if any, he made an accurate copy of the part in which corrections were made, and connected it with that part of which no corrections were made; that the testimony thus taken was returned by him to court; that he could not tell whether any corrections were made in Brace's testimony, or whether the paper was the original one on which he took the evidence.

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1 Hughes on Evidence, p. 57.

The respondent produced from the files of the clerk the master's report in the cases of Brace v. Yale and Yale v. Brace, and Gamwell identified it and testified that he intended to state the testimony of Marshall Brace in the exact language used, and believed that it was so stated in the report.

The papers in the suits of Yale v. Brace, and Brace v. Yale were introduced and referred to, to show what questions were in controversy between the parties in the suit, and the court being of the opinion that one of the matters in controversy between Brace and Yale was as to whether the height of the dam had been raised by Brace in the year 1863, admitted, against the objections of the complainant, the evidence of Brace's testimony upon the point, as stated in the report, and offered to permit the complainant to introduce the whole or any part of the testimony of Brace, in addition to that introduced by the respondent.

MORTON, J. It is an established rule of law that evidence of what a deceased witness testified on a former trial is competent in any subsequent trial of the same issue, between the same parties. And privies in estate are deemed to be the same parties within this rule. Commonwealth v. Richards, 18 Pick. 434. Warren v. Nichols, 6 Met. 261. Jackson v. Lawson, 15 Johns. 539. Jackson v. Crissey, 3 Wend. 251. Under this rule the presiding judge rightly admitted evidence of what Marshall Brace testified in the former trial of the cases between Brace and Yale. The parties in this suit derive their titles respectively from said Yale and Brace, and as to them are privies in estate. The court found, and it is not disputed, that one of the issues in the former suits was the same as one of the issues in this suit. Brace being dead, his testimony at the former trial upon this issue was competent. It has been held with great strictness in this Commonwealth, that the witness called to prove what a deceased witness testified in a former trial must be able to state the language in which the former testimony was given substantially and in all material particulars. Warren v. Nichols, *ubi supra*.

It is clear that the witness called to prove the testimony of Brace fulfilled this condition. Acting as a master in chancery, he took the testimony in writing, read it carefully to the witness, and made a report thereof to the court. He identified the report, and testified that "he intended to state the testimony of Marshall Brace in the exact language of said Brace, and believed that it was so stated in said report." No case could arise, except that of a deposition signed by the witness, in which more satisfactory guarantees could be fur-

nished that the exact testimony of the deceased witness is laid before the jury.

The point made by the complainant at the argument, that the question whether the witness could state the exact testimony of Brace should have been submitted to the jury, was not raised at the trial, is not open upon this bill of exceptions, and need not be considered.

Exceptions overruled.

JACKSON v. LAWSON.

15 Johns. (N. Y.) 539. (1818)

This was an action of ejectment for a farm in Poughkeepsie, in the county of Dutchess. The cause was tried before Mr. J. Van Ness, at the Dutchess Circuit, in August, 1817.

On the trial, John C. Brower, a witness on the part of the plaintiff, testified, that he knew William Lawson. the father of Peter Lawson, and the grandfather of the defendant; that W. Lawson died in possession of the premises in question in July, 1791; that the defendant was in possession of about fifty or sixty acres of land, the premises in question, which the defendant recovered in an action of ejectment against the witness, and Elizabeth Lawson, widow of W. Lawson, and that he went into possession by virtue of that recovery, seventeen or eighteen years before the trial, and had continued in possession ever since; that when W. Lawson died, he left his widow, Elizabeth, who is since dead, in possession; and that Peter Lawson had possessed the farm for a long time previous to his death, and the witness always understood that he bought the farm of his father W. Lawson.

The defendant gave in evidence the record of a recovery in an action of ejectment in this court, for the land in question, wherein James Jackson, on the demise of John Lawson, the now defendant, was plaintiff, and Elizabeth Lawson, the widow of W. Lawson and John Brower were defendants, and which cause was tried on the 14th of June, 1797, before Morgan Lewis, Esq., then one of the justices of this court, and judgment was signed the 4th of August, 1797. The defendant then offered to prove that the lessor of the plaintiff was present at the trial in that suit; that he was the agent of E. Lawson, in preparing the defense, conducting the trial, and examining and cross-examining the witnesses; and that Peter Dubois,

who is since dead, was sworn as a witness at that trial, on the part of the then plaintiff, and testified, in the hearing and presence of the lessor in this suit, that he surveyed the premises in question on the 14th of Feb. 1769, at the request of P. Lawson, and his father, William, and drew a deed in fee simple from William to Peter, and a bond from Peter to William for the purchase money, and that William told the witness, some months afterwards, that he had conveyed the premises to his son, and was afraid that he would not be able to pay the residue of the consideration money. This testimony was objected to, and excluded by the judge. The jury found a verdict for the plaintiff, which the defendant now moved to set aside, for a new trial, on the grounds, 1. That the verdict was contrary to evidence; and, 2. That the judge had rejected proper testimony.

VAN NESS, J., delivered the opinion of the court.

The first question I shall consider is, whether the testimony given by Dubois in the action of ejectment brought by the present defendant against the widow of William Lawson and Brower, and in which the then plaintiff had judgment in 1787, was properly rejected or not. By the will of William Lawson, he devised all his estate to his wife during her widowhood, with remainder to certain of his children, part of whose estate the now lessor of the plaintiff purchased in 1791. Both the widow of William Lawson, and the lessor of the plaintiff, thus claim under the same will; and I am inclined to think, that there is such a privity of estate between them, and the verdict in that case was, for certain purposes, evidence (though not conclusive) in this. It was evidence, at least, to lay the foundation for admitting the testimony given by Dubois, more especially as the lessor of the plaintiff, in point of fact, had notice of, and defended the former ejectment; was present at the trial, and had an opportunity of cross-examining the witnesses, though I lay no particular stress on these latter facts. The estate devised to the widow during her widowhood, and the remainder over, constitute but one estate carved out of the same inheritance, created and subsisting together, the one in possession, the other in expectancy. An estate in remainder is a present interest, though to be enjoyed in the future, and is capable of being aliened, devised, and otherwise disposed of, in the same manner as an estate in possession. The possession of the widow was, for certain purposes, the possession of the remainder men, and the entry of the present defendant, under the recovery in the ejectment, was a prejudice to those in remainder, for, in consequence of it, the estate in remainder has become a right in action only. The lessor

of the plaintiff had an interest in defeating the recovery, and his right was so interwoven with that of the widow, that the evidence of Dubois affected the one almost equally with the other. My attention was not called to this view of the subject at the trial; and the fact that the present lessor of the plaintiff had purchased part of the estate in remainder before the trial in 1797, was overlooked; and the counsel for the defendant put the admissibility of the testimony offered, on the ground that the lessor of the plaintiff was the agent of the widow, and present at the trial. It was held by Ch. J. Holt, "that if several estates in remainder be limited in a deed, and one of the remainder men obtains a verdict for him, in an action brought against him for the same land, that verdict may be given in evidence for the subsequent man remainder in action brought against him for the same lands, though he does not claim any estate under the first remainder man, *because they all claim under the same deed.*" Pike v. Crouch (1 Lord Raym. 730.)

If the verdict in the former ejectment was admissible on the trial of the suit, by reason that the tenant for life and the remainder men are privies in estate, it follows, that the evidence given in the first suit by a deceased witness, is also admissible. The rule is, that such evidence is proper, not only when the point in issue is the same in a subequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate or privies in law. On this ground, the defendant is entitled to a new trial; though, independently of this, I think a new trial ought to be granted on the other grounds taken in the argument, that the verdict is against the weight of evidence. The proof of a conveyance by William Lawson, in his lifetime, to his son Peter, is very clear and satisfactory.

New trial granted with costs to abide the event.

CORNELL v. GREEN.

10 S. & R. (Pa.) 16. (1823)

Error to the Court of Common Pleas of Dauphin County, in an ejectment, brought by the plaintiff below, Innis Green, administrator *Cum Testamento annexo,* of Robert McCord, deceased, against Thomas D. Cornell, James Armstrong and John Sawyer, the de-

fendants below, in which a verdict and judgment were rendered in favor of the plaintiff.

Exceptions were taken by the defendants below, on the opinion of the court on points of evidence, and also to their charge.

GIBSON, J. After the plaintiff had opened his rebutting evidence, he offered Mr. Fisher, who was of counsel in the cause, to prove what had been sworn on a former trial by a witness since deceased. On being examined as to the state of his recollection, Mr. Fisher testified that "from having been consulted before the suit was instituted, and having directed to be done, what the witness in the former trial swore was done; as well from frequently having recurred to his notes of the witness's testimony, as from conversations with him before the trial came on; he had a perfect recollection of what the witness swore; that he would not, however, pretend to say without a previous knowledge of all these facts, what the witness did or did not swear; that he is in the habit of taking down the very words of a witness, and not the substance of his testimony; and that to the best of his knowledge, his notes contain every word said by the witness on the occasion." Mr. Fisher added, "that conversant as he was with the cause, without frequently recurring to his notes, he would not undertake to state every word said by the witness, but that the material part of what he had said he could state without recurring to his notes." The defendants then objected to Mr. Fisher's competency to prove the matters proposed; but the court admitted him and sealed a bill of exceptions. I confess I cannot see any reason for the rule stated, in Mr. Phillipp's treatise, that a person called to prove what a deceased witness had said, must undertake to repeat his very words, and not merely to swear to their effect. The rule applied with that degree of strictness, would be altogether useless in practice for there is no man, be his powers of recollection what they may, who could in one case picked out of ten thousand, be qualified to give such evidence; and if he should undertake to swear positively to the very words, the jury ought on that account alone to disbelieve him. The reason assigned, that the jury and not the witness is to judge of the effect, is more plausible than sound. It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusion; and wherever the facts can be stated, it is not to be departed from. But every man must judge of external objects according to the impressions they make on his senses; and after all, when we come to speak of the most simple fact which we have wit-

nessed, we are necessarily guided by our impressions. There are cases where a single impression is made by induction from a number of others; as, where we judge whether a man is actuated by passion, we are determined by the expression of his countenance, the tone of his voice, his gestures, and a variety of other matters; yet a witness speaking of such a subject of inquiry, would be permitted directly to say whether the man was angry or not. I trust this will not be considered as refining too much, when it is considered that the subtlety is in the subject, and not in the manner of treating it. I take it, that whereever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separated and distinctly narrated, his impressions from these facts become evidence; and this on the ground that it is the best evidence of which the nature of the case is susceptible. Now the meaning of a witness often depends not much less on his emphasis, gestures, and even the expression of his countenance, than on the particular words he utters; and the superior value of *viva voce* evidence in the presence of the jury, depends altogether on this; yet no one will pretend that a by-stander who is unable minutely to describe all these, may not be heard. The truth is, that evidence of what a deceased witness said, being inferior in its nature to a personal examination before the jury, is admissible only from necessity and on the ground that better evidence does not remain behind, the jury being left to form their own judgment of the accuracy of the narration. I cannot therefore see why the same necessity which opens the way for secondary evidence of the very words of a deceased witness, should not open the way also for the substance of his testimony when his very words cannot be recollected; or discover the policy of a rule which should shut out the little light that is left, when it is *all* that is left, merely because it may not be sufficient to remove every thing like obscurity. But even where written notes of the evidence of a deceased witness are produced, it is sufficient to prove by the person who made them that they contain the true substance of what was said. Miles v. O'Hara, 4 Binn. 108. For these reasons, I am of opinion that Mr. Fisher was competent to testify to what the witness had sworn. It seems, however, singular that instead of trusting to Mr. Fisher's recollection, the plaintiff did not offer his notes in evidence against which, when properly authenticated, there could be no sort of objection.

Judgment affirmed.

WARREN et al. v. NICHOLS.

47 Mass. 261. (1843)

Trespass for breach and entry of the plaintiffs' close by the defendant's horses and sheep. * * *

SHAW, C. J. The jury in this action, which is trespass *quare clausam fregit,* having returned a verdict, that the alleged trespass was casual and involuntary, and assessed the damages at $12, and it appearing that $12 had been tendered as damages, before the action was brought, the defendant moves for judgment. This is opposed by the plaintiffs, who move for a new trial on the grounds stated in the report. The principal one is, that the testimony of Oliver Luce, as to what a deceased witness, Brown, had formerly testified, in this cause, in the Court of Common Pleas, and which was tendered by the plaintiffs, ought to have been received.

The rule upon which evidence may be given of what a deceased witness testified on a former trial between the same parties, in a case where the same question was in issue, seems now well established in this Commonwealth by authorities. It was fully considered in the case of Commonwealth v. Richards, 18 Pick. 434. The principle on which this rule rests was accurately stated, the cases in support of it were referred to, and with the decision of which we see no cause to be dissatisfied. The general rule is, that one person cannot be heard to testify as to what another person has declared, in relation to a fact within his knowledge, and bearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two. First, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party, upon whose interests it is brought to bear, has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends.

Now, the rule, which admits evidence of what another said on a former trial, must effectually exclude both of these reasons. It must have been *testimony,* that is, the affirmation of some matter of fact, under oath; it must have been in a suit between the same parties in interest, so as to make it sure that the party, against whom it is now offered, had an opportunity to cross-examine; and it must have been upon the same subject-matter, to show that his attention was drawn to points now deemed important. It must be the same testi-

mony which the former witness gave, because it comes to the jury under the sanction of his oath, and the jury are to weigh the testimony and judge of it, as he gave it. The witness, therefore, must be able to state the language in which the testimony was given, substantially and in all material particulars, because that is the vehicle, by which the testimony of the witness is transmitted, of which the jury are to judge.

If it were otherwise, the statement of the witness, which is offered, would not be of the testimony of the former witness; that is, of the ideas conveyed by the former witness in the language in which he embodied them; but it would be a statement of the present witness's understanding and comprehension of those ideas, expressed in language of his own. Those ideas may have been misunderstood, modified, perverted or colored, by passing through the mind of the witness, by his knowledge or ignorance of the subject, or the language in which the testimony was given, or by his own prejudices, predilections or habits or thought and reasoning. To illustrate this distinction, as we understand it to be fixed by the cases: If a witness, remarkable for his knowledge of law and his intelligence on all other subjects, of great quickness of apprehension and power of discrimination, should declare that he could give the substance and effect of a former witness's testimony, but could not recollect his language, we suppose he would be excluded by the rule. But if one of those remarkable men should happen to have been present, of great stolidity of mind, upon most subjects, but of extraordinary tenacity of memory for language, and who could say that he recollected and could repeat all the words uttered by the witness; although it should be very manifest that he himself did not understand them, yet his testimony would be admissible.

The witness called to prove former testimony must be able to satisfy one other condition, namely, that he is able to state all that the witness testified on the former trial, as well upon the direct as the cross-examination. The reason is obvious. One part of his statement may be qualified, softened or colored by another. And it would be of no avail to the party against whom the witness is called to state the testimony of the former witness, that he has had the right and opportunity to cross-examine that former witness, with a view of diminishing the weight or impairing the force of that testimony against him, if the whole and entire result of that cross-examination does not accompany the testimony. It may perhaps be said, that, with these restrictions, the rule is of little value. It is no doubt true,

that in most cases of complicated and extended testimony the loss of evidence by the decease of a witness cannot be avoided. But the same result follows, in most cases, from the decease of a witness, whose testimony has not been preserved in some of the modes provided by law. But there are some cases, in which the rule can be usefully applied, as in case of testimony embraced in a few words—such as proof of demand or notice on notes or bills—cases in which large amounts are often involved. If it can be used in a few cases, consistently with the true and sound principles of the law of evidence, there is no reason for rejecting it altogether. At the same time, care should be taken so to apply and restrain it, that it may not, under a plea of necessity, and in order to avoid hard cases, be so used as to violate those principles. It is to be recollected that it is an exception to a general rule of evidence supposed to be extremely important and necessary; and unless a case is brought fully within the reasons of such exception, the general rule must prevail.

I am aware that Mr. Greenleaf, in his learned and very excellent Treatise on Evidence, sec. 165, has intimated a doubt whether it is wise to hold the rule in question with this strictness; and the cases from the Pennsylvania Reports justify the suggestion, and warrant a more liberal construction of the rule, so far as it is practised in that State. But Mr. Greenleaf does not cite the case of Commonwealth v. Richards, 18 Pick. 434, and probably he had not adverted to it, when his treatise was written. That is a recent case, and one which we are bound to regard as of high authority in this Commonwealth.

The rule in regard to proving what a witness formerly testified, on a prosecution for perjury, does not seem to be strictly analogous. There, if it is proved by a witness, that the party now on trial formerly testified positively to a fact, and did not afterwards, in the course of his testimony, retract or modify that statement; on proof that the matter, thus testified as a fact, was not true, and the witness knew it, the perjury assigned may be considered well proved, although the accused testified to many other things, on the same trial, which the witness now called does not recollect, and which perhaps would be irrelevant, if he could. But the cases, we think, stand on different grounds. Rex v. Rowley, 1 Mood. Cr. Cas. 111.

All that the witness could state, in the present case, was, that he could give the substance of the witness's testimony, but not his precise language. We lay no stress upon the epithet "precise." It might properly lead to a further preliminary examination of the

extent of his knowledge and probably did so. As he could only give the substance and effect of the testimony, but not the language in which it was given, we think the judge did right in excluding him.

Judgment for the defendant for his costs.

JACKSON v. STATE.

81 Wis. 127. (1892)

CASSODAY, J. It appears that there was a former trial of this case, and the jury disagreed. Upon that trial the complaining witness, William Summers, was examined as a witness on the part of the state, and cross-examined on the part of the accused. After that trial, and before the last trial, that witness had died and his testimony, as taken by the stenographer on the former trial, was admitted in evidence upon this last trial against objection. It is claimed that such ruling was an infringement of a right secured to the accused by that clause of the constitution of this state which declares that "in all criminal prosecutions the accused shall enjoy the right to meet the witnesses face to. face." Sec. 7, art. I.

This language is quite similar to that contained in art. VI of the amendments to the constitution of the United States. In State v. Cameron, 2 Pin. 499, Stow, C. J., said: "The trial by jury, as it existed of old, is the trial by jury secured by our national and state constitutions. It is *not granted* by these instruments; it is more—it is *secured*. It is no American invention. Our fathers brought it with them to this country more than two centuries ago, and by making it a part of the constitution they intended to perpetuate it for their posterity, and neither legislatures nor courts have any power to infringe even the least of its privileges." That language is quoted approvingly by Ryan, C. J. in *In re Eldred*, 46 Wis. 553.

Thus it appears that the right of the accused to meet the witnesses face to face was not granted, but secured, by the constitutional clauses mentioned. It is the right, therefore, as it existed at common law that was thus secured. That right was subject to certain exceptions. One of these exceptions was that the declarations of a murdered person, made when he was at the point of death and every hope of this world gone, as to the time, place and manner in which, and the person by whom, the fatal wound was given, are admissible in evi-

dence, notwithstanding such deceased person was not sworn nor examined, much less cross-examined. This court has frequently held that the constitutional clause quoted is no bar to the admission in evidence of such declarations. State v. Cameron, 2 Pin. 490; Miller v. State, 25 Wis. 387; State v. Martin, 30 Wis. 223; State v. Dickinson, 41 Wis. 308. In these cases, it is, in effect, said that such rule as to the admission of such dying declarations was well settled before the adoption of our constitution, and that the same was not abrogated by the clause of the constitution quoted.

The testimony of a deceased witness, given upon a former trial, would seem to be admissible upon the same theory. "The chief reasons for the exclusion of hearsay evidence," says Mr. Greenleaf, "are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine and was legally called upon to do so, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties." 1 Greenl. Ev., sec. 163. In speaking of criminal cases, Mr. Cooley says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been submitted but appears to have been kept away by the opposite party." Cooley, Const. Lim. (6th ed.), 387, citing numerous cases. The attorney general cites numerous cases under similar constitutional provisions to the same effect.

Of course, to be admissible, such former testimony should be established or identified with reasonable certainty. Here the stenographer testified, in effect that while he did not recollect the fact, yet that he thinks he took down all the questions put to the witness, and his answers, and that he believed they were substantially correct. Counsel contend that this was not sufficient to authorize such admission within the rule of Zitske v. Goldberg, 38 Wis. 216, and Elberfeldt v. Waite, 79 Wis. 284. In neither of those cases had such testimony been taken down by the official court reporter. In each it was taken down by a justice of the peace. In the former it was said by the present chief justice that "the minutes of testimony taken by a justice of the peace on a trial before him are subjected to no such scrutiny

(as in a bill of exceptions), and possess none of these important and essential elements of verity. On the contrary, they are made in the haste and confusion of trials, generally by men who are quite unused to the business and no power to make corrections after the trial is vested in any one. Hence the reasons for admitting such testimony when it is found in a settled case or bill of exceptions, entirely fail when the offered testimony is contained in the justice's minutes." Mr. Greenleaf says that "it was formerly held that the person called to prove what a deceased witness testified on a former trial must be required to repeat his *precise words*, and that testimony merely to the effect of them was inadmissible. But this strictness is not now insisted upon in proof of the crime of perjury; and it has been well remarked that to insist upon it in other cases goes in effect to exclude this sort of evidence altogether, or to admit it only where, in most cases, the particularity and minuteness of the witness' narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty and of the truth of his evidence. It seems therefore, to be generally considered sufficient if the witness is able to state the substance of what was sworn on the former trial. But he must state in substance the whole of what was said on the particular subject which he is called to prove." 1 Greenl. Ev. sec. 165. Since the proof of such former testimony may be different upon a new trial, it becomes unnecessary, in the view we have taken on the case, to say more about it here.

Reversed on other grounds.

THE UNITED STATES v. MACOMB.

5 McLane's Rep. 286 (U. S. C. C.) (1873)

DRUMMOND, J. The defendant was indicted under the 21st and 22nd sections of the Post Office Act of March 3, 1825, 4 Statutes at Large 107-9, for stealing from the mail a packet containing a land warrant and fifty dollars in bank notes. The defendant was present with his counsel at the examination, during which one Hurlbut, since deceased, who had enclosed the land warrant and bank notes, and directed and posted the letter, testified as a witness for the United States.

In this case there was other evidence, independent of the testimony of Hurlbut before the committing officer, which might have authorized the jury in finding their verdict; but there can be no doubt that his testimony may have had much influence upon the jury, and, under the circumstances of this case, I should grant a new trial if I thought the testimony should have been excluded. After reflection, however, and all the examination I have been able to give to the subject, I am of the opinion that the ruling at the trial was correct.

The objection resolves itself into the two following propositions: First. The declarations of a deceased witness made at a former trial between the same parties, upon the same subject-matter can never be given in criminal cases. Secondly. If they can be, it is only when the persons who are called on to give the declarations of a deceased witness can repeat the precise words of the witness, and it being admitted that that was not done here, the testimony ought to have been rejected.

It is well known that there has long been a difference of opinion upon both these points.

It is not controverted that the testimony of a deceased witness given at a former trial between the same parties, in the same issue, is admissible in civil cases. There seems no difference of opinion as to that. But some of the authorities &c., deny the application of the rule to criminal cases.

In the United States v. Wood, 3 Washing. C. C. R. 440, which, like this, was a case of robbing the mail, though the testimony was rejected because the precise words could not be given, no allusion whatever is made to any difference between civil and criminal cases.

The King v. Joliffe, 4 T. R. 290, in which Lord Kenyon used these words in relation to the rule which has been since so often quoted, was a criminal information, and he speaks of no distinction.

Most of the modern elementary writers, Phillips, Starkie, Roscoe, and Greenleaf advert to the rule as one of general application in all cases. And Russell, particularly, in his valuable little treatise of the law of Evidence, which he has added to his work on Crimes, says expressly, the rule applies to criminal prosecutions, 2 Russ. 683.

PEOPLE v. LEM YOU.

97 Cal. 224. (1893)

MCFARLAND, J. Defendant was convicted of perjury, and appeals from the judgment, and from an order denying a new trial.

It is charged in the information that the appellant, Lem You, gave certain false and material testimony on the trial of one Wong Ark for the alleged murder of a woman named Goot Gue, who was shot in or in front of the house in which she lived, on the night of April 26, 1891, in the city of Los Angeles.

For the purpose of showing the materiality of the alleged false testimony of appellant, the prosecution offered evidence of the testimony which two witnesses named Rohn and Bevan gave at the said trial of said Wong Ark. (There were two or three trials of the said Ark, but the alleged false testimony occurred at the first of said trials.) To this evidence the appellant objected, as incompetent, irrelevant, and immaterial, because appellant, not being present when said testimony was given, had no opportunity to examine or cross-examine said witnesses, because said Rohn was living within the jurisdiction, and should have been called himself, and because Bevan having since died, there is no rule by which his former testimony can be introduced in this cause. The court overruled the objections, and appellant excepted.

The ruling of the court was right. The purpose was, not to produce said testimony anew, as tending to prove the facts stated therein: it was offered merely for the purpose of showing as a fact that such testimony had been given, and it was expressly limited by the court to that purpose. The materiality of alleged false testimony does not always appear upon its face, or when simply compared with the indictment; it may be material on account of certain other testimony which had been previously introduced on the trial of a cause. The the testimony given by another witness which is material, or if going to the credit or discredit of other witnesses, etc. For instance, if, on the trial of A for a felony B should testify that C was at a certain place at a certain time, this would not appear upon its face to be material; but if C had previously testified that he was at another and remote place at said time, and had seen A commit the criminal offense charged, then it clearly would be material. And so the previous evidence, and the state of the cause in the action in which the alleged false testimony was given, may be proven, in order to show

the materiality of the latter (*2* Russell on Crimes, 662; 3 Greenleaf Ev. 197); otherwise the materiality of alleged false evidence could rarely be shown. The rule contended for by appellant was confronted with the witnesses who testified to that fact. If the greater part of the testimony of appellant given in the Wong Ark trial was material at all, it was so only in connection with the said testimony of said witnesses Rohn and Bevan.

Reversed on other grounds.

BROWN v. COMMONWEALTH.

73 Pa. St. 321. (1873)

At the April Term 1872 of the court below, the grand jury found a true bill against Joseph Brown for the murder of Daniel S. Kraemer.

There was a large amount of evidence tending to connect the prisoner with the murder.

The Commonwealth having examined a great number of witnesses and having shown that one Isaac Hummel had been arrested with the prisoner on suspicion of being connected with the murder, called B. B. McCool, Esq., a member of the Schuylkill county bar, who testified:

"I was present at the examination of Charles Ewing before 'Squire Reed in this court-house.' Squire Reed is a justice of the peace in the borough of Pottsville. Joseph Brown was present at that hearing and represented by counsel. There were two members of the bar, Messrs. Farquhar and Strouse, there. They represented Brown and Hummel. It was not a preliminary hearing before the committing magistrate I took notes of the testimony as given by Charles Ewing; (notes shown witness) these are the notes. These notes are correct of Charles Ewing's testimony. Mr. Ewing was very much excited and embarrassed and not very coherent. I took down nearly every word he said, and order in which he said it, and I think in his language. I will say that I think the notes contain the exact words of the witness. In taking the notes I made the question and answer conform to the exact words of the attorney and witness. I had not time to write down the questions, but took questions and answers together. I was not acting as counsel, but as clerk for the district attorney, at his request. I am now counsel in the case, retained for

the Commonwealth. I think my notes contain the exact words of the witness."

The Commonwealth then offered to read the testimony of Ewing from the notes of Mr. McCool. The offer was objected to by the defendant, admitted by the court, and a bill of exceptions sealed.

READ, C. J. This is a writ of error to the Criminal Court of Schuylkill county, sued out under the Act of the 15th of Feb. 1870, upon the oath of the defendant, and brings up the whole record.

* * *

On the preliminary hearing before the committing magistrate, the defendant and his counsel being present, a witness was examined whose testimony was taken down by defendant's counsel, and the witnesses having died before the trial, the notes of his evidence proved by the counsel under oath, were offered in evidence, objected to and admitted. It was objected that by the Constitution of the state, the defendant was entitled to meet the witnesses face to face.

The doctrine on this subject is thus laid down in the 3rd volume of Russell on Crimes, by Greaves, 4th edition, 1865, page 249. "If there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness, given upon oath at the former trial, is admissible on the subsequent trial, and may be proved by any one who heard him give evidence," and the same is repeated at page 424 in the note. We find the same rule in 1 Phillips & Arnold's Evidence, pp. 445, 447. Dr. Wharton, in his valuable Treatise on Criminal Law in the United States, vol. 1, p. 667, says: "The testimony of a deceased witness given at a former trial or examination, may be proved at a subsequent trial by persons who heard him testify. Even the notes of counsel of the testimony of such witness on a former trial between the same parties, touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel does not recollect the testimony independently of his notes. The better opinion seems to be that it is sufficient to prove the substance of what the deceased witness said, provided the material particulars are stated, though it has been sometimes held, that unless the precise words could be given the testimony would be rejected."

In this state the most liberal rule has been adopted, in relation to the former evidence of what was testified to by a deceased witness on a former trial or examination, as will be seen by referring to Cornell v. Green, 10 S. & R. 14; Chess v. Chess, 17 Id. 409; Moore v. Pearson, 6 W. & S. 50, and Rhine v. Robinson, 3 Casey 30, in which

Chief Justice Lewis said: "The notes of counsel, showing what a deceased witness testified to on a former trial between the same parties touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel did not recollect the testimony independent of his notes, and although he did not recollect the cross-examination." To which may be added the decision in Phil. & Reading R. R. v. Spearen, 11 Wright, 306, the opinion being delivered by my brother Agnew.

There was, therefore, no error in the court admitting the notes of Mr. McCool of the testimony of Ewing, a deceased witness in the examination before the committing magistrate, or the notes of any other counsel, or those of the committing magistrate himself.

Reversed on other grounds.

DYING DECLARATIONS.[1]

RAILING v. COMMONWEALTH.

110 Pa. St. 100. (1885)

GREEN, J. The principal question in this case is that which relates to the admissibility of the dying declarations of Annie Foust. The defendant was charged with administering to her a drug with intent to procure a miscarriage, and it was also charged that her death resulted in consequence. There were four counts in the indictment and all of them charged the death of the woman as the result of the defendant's unlawful act. It is entirely unquestioned that dying declarations are admissible only in homicide cases, as a rule, and that the death of the deceased must be the subject of the charge and the circumstances of the death of the subject of the declarations: 1 Greenl. Ev. sec. 156, 13th ed. Whart. C. Ev. sec. 276; Whart. Am. Cr. Law sec. 669 *et seq.* It is equally unquestioned that there is no grade of homicide involved in this case, the offense charged being the one commonly known as abortion. It is argued, however, with much force, that the death of the woman, when it occurs, is a necessary ingredient of the offense, under our statute, and therefore brings the case within the rule above stated. It is claimed that the death is in

[1] **Hughes on Evidence, p. 62.**

part at least the subject of the charge. In one sense this is true. But the question is, is it so in the real sense of the rule which controls the subject? That inquiry involves the necessity of an examination of our criminal statute against abortion. It consists of two sections, the 87th and 88th of the criminal code of 1860. The 87th provides that if any person shall unlawfully administer any drug or substitute to a pregnant woman, or use any instrument with intent to procure her miscarriage, and she or the child shall die, in consequence of such act, such person shall be guilty of felony, and shall be sentenced to pay a fine not exceeding $500, and to undergo imprisonment at labor not exceeding seven years. The 88th section provides that if any person with intent to procure the miscarriage of any woman shall unlawfully administer to her any drug or substance or use any instrument or other means with like intent, he shall be guilty of felony and be sentenced to pay a fine not exceeding $500, and undergo an imprisonment at labor not exceeding three years. In the last case the offense is complete without the death of the woman or child. In both cases the grade of the offense is the same—felony. In both, the acts done by the prisoner are the same. In the first, if those acts are followed by the death of the mother or child as a consequence, that is, in the relation of effect to a cause, a difference results in one of the penalties imposed. The possible fine is the same, but the possible imprisonment is longer, seven years instead of three. The facts which constitute the crime are precisely the same in both cases, to wit, the administering the drug, or using the instrument with intent to procure a miscarriage. It follows that the death is no part of the facts which go to make up or constitute the crime. It is complete with the death or without it. The death therefore considered in and of itself is not a constituent element of the offense. It may happen or it may not. If it does not happen a certain possibility of penalty follows. If it does happen the same character of penalty results but with a larger possibility, not a certainty, in one of the items. This seems to be a precise expression of the difference between the cases provided for in the two sections. This being so the question recurs, is the difference between the two of such a character as to change the application of the rule of law relating to the admissibility of dying declarations. Of course they are not admissible if death does not result as a consequence from the unlawful acts. Therefore if the woman should subsequently die from some entirely different and independent cause, her dying declarations in relation to a prior miscarriage would be clearly incompetent. In case she does

die in consequence of the unlawful acts, the crime charged and tried is not homicide in any of its forms, but the felony of administering a drug, or using an instrument, with intent to produce a miscarriage. In its facts and in its essence it is the same crime that is charged and tried if no death results. The death, when it occurs, is an incident the sole purpose of which is to determine whether the imprisonment of the defendant may be longer than when the death does not occur. The facts which constitute the crime may not be proved by any declarations of the woman, when death does not follow, or when it follows from some other cause. Why then should the very same facts be proved by such declaration, when death does result? Not because it is a homicide case and the rule as to dying declarations admits them in such cases, because it is not a case of homicide in any point of view. Not because the death is the subject of the charge, for the charge is the attempted or accomplished miscarriage by means of a drug or instrument. That crime is as fully completed without the death as with it. The death therefore is not an essential ingredient of it. Its function under the statute, when it occurs as a consequence is, not to determine the factum, or the character, or the grade of the crime, but the character of the penalty to be endured by the criminal. Of course if the statute had declared that when death resulted the offense should be manslaughter or any other grade of homicide, the case would be entirely different. Then the death would be an essential ingredient of the offense, and would be the subject of the charge, and the rule as to dying declarations would apply. But such is not this case and we do not think it wise to enlarge the operation of the rule so as to embrace cases other than homicide strictly. The objections to the admission of such testimony are of the gravest character. It is hearsay, it is not under the sanction of an oath, and there is no opportunity for cross-examination. It is also subject to the special objection that it generally comes from persons in the last stages of physical exhaustion, with mental powers necessarily impaired to a greater or less extent, and at the best represents the declarant's perceptions, conclusions, inferences and opinions, which may be and often are, based upon imperfect and inadequate grounds. Nor is the reason ordinarily given for their admission at all satisfactory. It is that the declarant in the immediate presence of death is so conscious of the great responsibility awaiting him in the near future if he utters falsehood, that he will in all human probability utter only the truth. The fallacy of this reasoning has been many times demonstrated. It leaves entirely out

of account the influence of the passions of hatred and revenge which almost all human beings naturally feel against their murderers, and it ignores the well known fact that persons guilty of murder, beyond all question, very frequently deny their guilt up to the last moment on the scaffold.

But in point of fact the reason we are considering cannot be regarded as the real or the controlling reason for the rule, because, in terms, it would be just as applicable to declarations made by dying persons in regard to civil affairs or to all minor criminal matters, as to the facts attending a homicide. In truth there would be less temptation to falsify in regard to such matters than in regard to acts of violence perpetrated upon the person of the declarant. Yet it is undisputed that in all civil cases and in all crimes other than homicide, such declarations are entirely incompetent. A far better reason in support of the rule, as it seems to us, is, that dying declarations are admitted from the necessity of the case and in order that murderers may not go unpunished. Such a reason only can justify their admission in cases involving the life of the accused. While ordinarily the precautions against illegitimate testimony increase with the danger menacing the accused, in this one exceptional case of homicide they are relaxed, and the rule which excludes mere declarations in all other cases is reversed. In Whart. Crim. Ev. sec. 278, the rule is thus stated: "Dying declarations are admitted from the necessity of the case, to identify the prisoner and the deceased, to establish the circumstances of the *res gestae*, and to show the transactions from which the death results." In Greenl. on Ev. Vol. 1) 13th ed.) sec. 156, the writer says: "These or the like considerations, have been regarded as counterbalancing the force of the general principle above stated; leaving this exception to stand only upon the ground of the public necessity or preserving the lives of the community by bringing manslayers to justice. For it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed." In the foot-note 2 to the above section the opinion of Judge Redfield is quoted in the following words: "But it was from a misapprehension of the true grounds upon which the declarations are receivable as testimony. It is not received on any other grounds than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of admission."

Believing this to be the true ground upon which to place the admissibility of dying declarations, it will be seen at once that they are incompetent except in cases of actual homicide, where the killing is the very substance and subject of the criminal accusation on trial. This we hold to be the true sense in which to interpret the rule that such declarations are only admissible where the death is the subject of the charge.

All the text books and a host of judicial decisions assert that the rule of admissibility is confined to cases of homicide. Thus this court in Brown v. Commonwealth, 23 P. F. S., on p. 327, state the rule quoting from Whart. Am. Cr. Law, sec. 669 in these words: "The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal wound are constantly admitted in criminal prosecutions where the death is the subject of criminal inquiry, though the prosecution be for manslaughter; though the accused was not present when they were made and had no opportunity for cross-examination, and against or in favor of the party charged with the death."

There is a vast number of cases in which where the prisoner is tried for a crime other than homicide the dying declarations of the persons upon whom the crime was perpetrated are inadmissible, though they relate to the circumstances of the crime. Thus in Rex v. Lloyd et al., 4 Carr. & P. 233, it was held that on an indictment for robbery the declaration *in articulo mortis* of the party robbed is not admissible in evidence. Boland, B., said, "I think that declarations *in articulo mortis* are not admissible in evidence to make out a charge of robbery; nor indeed any other charge except those in which the death of the deceased person, by whom the declaration was made, is the subject of inquiry." A citation of this class of cases is not necessary as they are quite familiar and are not at all disputed. It only remains to consider the course of authority upon the very question now before us. It has never heretofore been before this court. But in England and several of the states it has been considered and determined, and the weight of authority seems to be quite decidedly against the admissibility of the evidence. Thus in Rex v. Hutchinson, 2 B. & C. 608, note a, the prisoner was indicted for administering savin to a woman pregnant but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The court rejected the evidence, observing that although the declaration might relate to the cause of the death, still such declarations were

admissible in those cases alone where the death of the party was the subject of the inquiry. In Reg. v. Hind, 8 Cox, C. C., 300, the defendant was indicted for using instruments upon a woman with intent to produce an abortion, in consequence of which she died. It was held that her dying declarations in relation to the offense were inadmissible. The same course was followed in the state of New York in the case of the People v. Davis, 56 N. Y. 95, where the statute is quite similar to our own, the penalty being increased when the woman dies in consequence of the unlawful acts. It was held that the dying declarations of the woman were incompetent on the general ground that the death was not the subject of the charge. In the case of the State v. Harper, 35 Ohio St. Rep. 78, the same doctrine was held under a statute almost identical with ours. The Chief Justice said, "This was an indictment for unlawfully using an instrument with the intent of producing an abortion, and not an indictment for homicide:" State v. Barker, 28 Ohio St. 583; People v. Davis, 56 N. Y. 96. The death was not the subject of the charge, and was alleged only as a consequence of the illegal act charged, which latter was the only subject of investigation. Did the court err in rejecting the dying declaration in proof of the charge? We think not. The general rule is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declaration: Rex v. Mead, 2 B. & C. 605; 1 Greenl. Ev. 156; Rex v. Lloyd, 4 C. & P. 233."

On the other hand the Supreme Court of Indiana has held that such declarations were admissible in an indictment under a similar statute: Montgomery v. State, reported in 3 Crim. Law Mag., 523. In State v. Dickinson, 41 Wis. 299, the declarations were admitted, but by the statute of that state the offense is expressly made manslaughter where the woman dies and the case was therefore one of homicide and within the rule. The case in Indiana appears to be the only one in a court of last resort in which the declarations have been held admissible. After a careful examination of the opinion in that case, and also of two other cases decided by Courts of Quarter Sessions in our own state, we feel constrained to say we think the better, and the safer rule is to limit the admissibility of dying declarations to cases of homicide only. We are therefore of opinion that the learned court below was in error in receiving the declarations of Annie Foust in this case and for that reason the judgment must be reversed.

Judgment reversed.

JOHNSON v. STATE.

50 Ala. 456. (1873)

The indictment in this case contained a single count charging that the defendant, Jerry Johnson, "did carnally know, or abuse in the attempt to carnally know, Frances Rickett, a female under the age of ten years." The defendant, when arraigned, pleaded not guilty; and he was tried on issue joined on that plea. On the trial, as the bill of exceptions states, "the court admitted, against the defendant's objection, evidence of the dying declarations of the child upon whom the outrage was committed, as to who committed it, to go to the jury, —not for the purpose of showing complaint made, but to be considered by the jury as competent evidence to fix guilt on the defendant, along with the other evidence of the case, if the jury believe such declarations were made. The proper predicate was laid for the introduction of the dying declarations, if they were competent evidence under the issues in the cause, and they were to this effect: 'Ma, I'm going to die, and Jerry Johnson done me so,' the child pointing at the time to her injured parts. The defendant moved to exclude said dying declarations from the jury, on the ground that they were illegal in the case; which motion the court overruled, and the defendant duly excepted. This was all the evidence in any way affecting or material to the ruling of the court upon the admissibility of said declarations."

The verdict of the jury was, "We, the jury, find the defendant guilty, to be punished by imprisonment in the penitentiary for life." The defendant moved in arrest of judgment,—1st, because the indictment charges two offenses, and the verdict is of guilty merely, without ascertaining of what; 2ndly because it is impossible to tell of what offense the defendant was convicted, or whether the finding is supported by the evidence." The court overruled the motion in arrest of judgment, and sentenced the defendant to confinement in the penitentiary for life.

The admission of the dying declarations of the child and the overruling of the motion in arrest of judgment, are now assigned as error.

BRICKELL, J. The statute (Rev. Code, sec. 3663) declares the carnal knowledge of a female under the age of ten years, or the abuse of such female in the attempt carnally to know her must, at the discretion of the jury, be punished either by death, imprisonment in

the penitentiary for life, or hard labor for the county for life. The form of the indictment prescribed by the Code (and which in this case has been pursued) is, "A. B. did carnally know, or abuse in the attempt to carnally know C. D., a female under the age of ten years." This form of indictment the Code authorizes, when offenses are of the same character, and subject to the same punishment. Rev. Code, sec. 4125. It was permissible, at common law, to charge such offenses in different counts, to meet the evidence when fully disclosed on the final trial. No right of the accused is invaded, in permitting them to be charged in the alternative, in the same count, instead of several counts charging each alternative. Burdine v. State, 25 Als. 60; Sherrod v. State, Ib. 78. Under such an indictment, the defendant may be convicted on proof of either grade or form of the offense. McElhany v. State, 24 Ala. 71; Mooney v. State, 8 Ala. 328; Cheek v. State, 38 Ala, 227. And a general verdict of guilty, on such an indictment is not ground of error, or motion in arrest of judgment. Cawley v. State, 37 Ala. 152. It is not ground of error, or motion in arrest of judgment, because it protects the defendant from any future prosecution for either grade or form of the offense, and the sentence pronounced cannot impose any greater punishment, than would have followed a specific finding of guilt of one form or grade of the offense, and not guilty as to the other, they must have affixed the punishment, not other or different for the one than the other grade. No possible injury can, therefore, result to the accused from such finding.

2. The bill of exceptions expressly negatives any presumption that the dying declarations of the child, on whom the injury is charged to have been committed, were offered or received as part of the *res gestæ*, or were so closely connected with the wrong as to be considered as her complaint thereof. It is affirmed they were offered strictly as her dying declarations. In so admitting them, the court erred. Dying declarations, according to the unbroken current of modern authorities, are admissible only in cases of homicide, when death, with the circumstances attendant on it, and the guilty agent in producing it, is the subject of inquiry. 2 Phil. Ev. 610, note 455.

For this error, the judgment is reversed, and the cause remanded; but the prisoner must remain in custody, until discharged by due course of law.

THURSTON v. FITZ.

91 Kan. 468. (1914)

WEST, J. The theory on which dying declarations have been admitted is that the realization of impending death operates on the mind and conscience of the declarant with strength equal to that of an ordinary oath administered in a judicial proceeding. After such declarations became classed as hearsay in other cases it was thought better to accept this sort of substitute for a formal oath in homicide cases than to let a guilty manslayer escape. As stated in The State v. O'Shea, 60 Kan. 772, 57 Pac. 970, the rule is limited to cases of homicide and is confined to the act of killing and the circumstances immediately attending the act which form a part of the *res gestæ*. In The State v. Bohan, 15 Kan. 407, it was said by Chief Justice Kingman:

"Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer by putting the witness, and generally the sole witness, of his crime beyond the power of the court by killing him, shall not thereby escape the consequences of his crime." (p. 418)

But in The State v. Reed, 53 Kan. 767, 37 Pac. 174, the present chief justice stated that:

"The controlling question is, whether the declarations were uttered under a sense of impending dissolution, and the fact that death did not immediately ensue, or that a hope of recovery was subsequently entertained, will not affect their admissibility. (p. 773)

And in The State v. Knowll, 69 Kan. 767, 77 Pac. 580, the statement was made that:

The reasons why dying declarations are taken out of the rule which excludes hearsay testimony are those of necessity, joined with the conclusion that a realization by the declarant of the certain and speedy approach of death would be as powerful an incentive on his part to tell the truth as would the administration of an oath." (p. 770)

The history of the rule and its application as given by the leading text writers on evidence shows that at a very early time it was thought with the fathers of the civil law that one would tell the truth on his death-bed, and for a time dying declarations were admitted in cases both civil and criminal; but later they were confined to cases of homicide, the idea having become prevalent that so excep-

tional and dangerous a class of evidence should be restricted in its use and application to the "Public necessity of preserving the lives of the community by bringing manslayers to justice." (1 Greenleaf on Evidence, 15th ed. sec. 156.)

It has ever been realized that the party most vitally affected by such declarations is without the means of cross-examination, and it is somewhat curious to observe the readiness with which the courts have concluded that their admission is not in conflict with the constitutional right to meet one's witness face to face. 1 Elliot on Evidence, sec. 345.) It would seem that the courts first conceived and recognized the sanction which pending death would give to the statement, and that this was rather a predecessor than an exception to the general rule excluding hearsay testimony; that after hearsay had become generally regarded as inadmissible it was reasoned that dying declarations inherently belong in that class, but that as a matter of public policy or necessity their legitimacy should be recognized in homicide cases only. One author informs us that some of the earlier text-writers interpreted the rule as applying to civil as well as criminal cases and the courts upon examination found that such interpretation was incorrect. (1 Elliot on Ev. sec. 351.) Another states that up to 1800 no distinction is found between civil and criminal cases or between different kinds of criminal cases. 2 Wigmore on Evidence, sec. 1431.) A writer in the American Law Journal reviewing the history of the matter concludes that up to 1836 in England such declarations were admitted in all cases, civil and criminal, and that the present rule was reached by the decisions of various courts in this country from 1806 to 1874. (1 Am. Law Jour. p. 366.) The real basis of admissibility, aside from any supposed theory of necessity, is the notion which long ago became a rule of law that the conscious danger of impending death is equivalent to the sanction of an oath. Lord Chief Baron Eyre is credited with the dramatic statement that:

"They are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive of falsehood is silenced, and the mind is induced by the most powerful consideration, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." (1 Greenl. on Ev. 15th ed. sec. 156.)

Some have sought to base the change which restricts such evidence to the one class of cases on the fact, disclosed by experience, that

some really do not tell the truth even *in articulo mortis,* and hence it is argued that it was deemed safer to exclude such statements except when the exclusion might let a murderer go free. If this was ever seriously deemed the basis of the change it certainly lacked the merit of logic or consistency, for some are not truthful when under the sanction of an oath duly administered, and in no class of cases should doubtful evidence be received more charily than in those involving the life and liberty of the one on trial. And by so much the more should any sort of evidence safe to be admitted in such a case be deemed proper in an action involving mere property rights. Prof. Wigmore suggests that:

"The notion that a crime is more worthy the attention of courts than a civil wrong is a traditional relic of the days when civil justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the King's name were zealously encouraged because of the fines which they added to the royal revenues. The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same the admissibility should be the same." (2 Wig. on Ev. sec. 1436.)

The rule admitting and the rule restricting the declaration, as indicated, are entirely court made, and when the reason for this restriction to cases of homicide ceases, if it ever existed, then such restriction should likewise cease. It might be argued that this common-law doctrine has become so embedded in our judicial system that it should be left untouched. But it was said in Harrington v. Lowe, 73 Kan. 1; 84 Pac. 570, that there was no longer any reason for the common-law doctrine relating to the contracts of married women, "and with the death of the reason for it every legal doctrine dies." (p. 21.)

In McFarland v. Shaw, 4 N. Car., 2nd ed. 200, 2 N. Car. Law Repos. 102, the Supreme Court of North Carolina decided that in an action by a father for the seduction of his daughter he could give in evidence her dying declaration charging the defendant with having been her seducer. It was said that the decision was confined to the facts presented, but in holding the evidence competent the court used this language:

"In cases where life is at stake, such evidence is uniformly received and credited, and numerous are the victims of its authority, recorded in the mournful annals of human depravity. Can the practice of receiving it to destroy life, and rejecting it where a compensation

is sought for a civil injury, derive any sanction from reason, justice or analogy?" (p. 203.)

The Supreme Court of Georgia in criticizing this holding as contrary to the whole current of authority said:

"We will not say that there is not, perhaps, as much reason for admitting the evidence in a case like this as in one of a homicide." (Wooten v. Wilkins, 39 Ga. 223, 225.)

In Barfield v. Britt, 47 N. Car. 41, the decision in McFarland v. Shaw was repudiated. It was said the holding had manifestly been made under the impression then generally prevalent that dying declarations were admissible under the rule stated by Lord Chief Baron Eyre, and that if it stood upon the general principle alone "it might well have been contended, as it was contended, that dying declarations ought to be admitted in all cases, civil as well as criminal." (p. 43.) But the court deemed the lack of opportunity for cross-examination the reason for restricting such declarations to criminal homicide cases, a view for which we do not find much reason or authority. We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason and continued without justification. The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and if no reason ever existed, that fact furnishes additional justification.

The doctrine of *stare decisis* does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted and a reversal would work a greater injury and injustice than would ensue by following the rule. (11 Cyc. 749.) The tendency is towards the reception rather than the rejection of evidence, experience having shown that more harm results from its exclusion than from its admission. (Fish v. Poorman, 85 Kan. 237, 243, 116 Pac. 898; 1 Wigmore on Ev. sec. 578.) We hold that the declaration is competent, and upon another trial should be admitted.

The ruling sustaining the demurrer is reversed and the cause is remanded for further proceedings.

BENSON, J. (dissenting): The rule that dying declarations are only admissible where the death of the declarant is the subject of investigation is settled as firmly in the jurisprudence of this state as any rule can be which is not established by constitution or statute.

Conceding that the rule should be changed, there is one obvious

reason, without referring to others, why the legislature and not the court should make it.

Professor Wigmore, after a careful review of the decisions, including those of this state, concludes that the limitations upon the admission of dying declarations do not rest upon sound principles. But his recommendation is that they be abolished by legislation. (2 Wigmore on Evidence, sec. 1436.) It is dangerous to abolish them otherwise.

I dissent from that part of the opinion which overthrows the rule of common law and the decisions of this court concerning dying declarations.

BOYLE v. THE STATE.

97 Ind. 322. (1884)

NIBLACK, J. This was a prosecution for murder, under section 1904 R. S. 1881.

The indictment was in six counts. The first count charged the appellant, William Boyle, with having, on the 15th day of March, 1884, at the county of Allen, in this State, unlawfully, purposely, feloniously, and with premeditated malice, killed and murdered one Daniel Casey, by then and there shooting him to death with a pistol. A jury found the defendant guilty of murder in the first degree as charged above in the first count of the indictment, and fixed his punishment at death. After considering and overruling a motion for a new trial, the court pronounced judgment upon the verdict, and sentenced the defendant to be hung on Wednesday, the 1st day of October, 1884.

One question remains which ought to be ruled upon at the present hearing to relieve the embarrassment which might otherwise result when the cause shall again be tried. The dying declaration of Casey, which had been reduced to writing, was, after satisfactory preliminary proof, read in evidence by the prosecuting attorney, as follows:

"Dying declaration of Daniel Casey, taken at Monroeville, Allen county, Indiana, on the 16th day of March, 1884. Q. What is your name and residence? A. Daniel Casey; Norwich, Connecticut. Q. Have you given up all hope of life? A. I have, of course. Q. Is this declaration which you now make free from all malice? A. Yes,

it is; I forgive him. Q. What is the name of the man who shot you? A. I don't know his name. Q. Where were you when he shot you? A. On the corner of Railroad and Empire streets in the town of Monroeville, Allen county, Indiana. Q. Was the man whom you identified on the 15th of March, in the presence of the marshal of Fort Wayne, J. B. Neezer, Dr. C. A. Lester, and others, the man who shot you? A. Yes, sir; that was the man who shot me. Q. What reason, if any, had the man you have so identified for shooting you? A. Not any that I know of; he said he would shoot my damned heart out. Q. What were you doing at the time the shooting took place?

his
DANIEL X CASEY."
mark.

It was objected that this declaration was inadmissible in evidence: First, because it was in the form of a deposition. Secondly, because the answer to the question "What reason, if any, had the man for shooting you?" was a mere expression of an opinion by Casey, in disregard of the inhibition imposed by the case of Binn v. State, 46 Ind. 311. Thirdly, because it was incomplete by reason of the failure of Casey to answer the last question addressed to him.

In the first place, a dying declaration may be made in answer to questions addressed to the dying man and reduced to writing. 1 Greenl. Ev. sec. 159 and note; Com. v. Haney, 127 Mass. 455; State v. Martin, 30 Wis. 216.

In the next place, the words "what reason," referred to in the second objection, were, in the connection in which they were used, synonymous with the phrase "what cause," and plainly had reference to facts within Casey's knowledge, and not to opinions merely which he might have entertained. Casey's answer, "Not any that I know of," was more in the nature of the denial of a fact than the expression of an opinion.

In the case of Wroe v. State, 20 Ohio St. 460, the court held that "There is no valid objection to the admission of the evidence of Smith Davidson as to the dying declarations of the deceased. The declaration of the deceased, in speaking of the fatal wound, that, 'it was done without any provocation on his part,' objected to as being mere matter of opinion. Whether there was provocation or not, is a fact, not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence."

The conclusion reached in that case is sustained in principle by the

cases of Rex v. Scaife, 1 M. & R. 551, and Roberts v. State, 5 Tex. Ap. 141, and the precedent it affords may, as we believe, be safely followed in its fairly analogous application to the question now before us. See, also, Whart. Crim. Ev., sec. 294.

In the third place, the declaration was complete as to the answers to all questions which it purported to answer, and in that sense it was not fragmentary within the meaning of the case of State v. Patterson, 45 Vt. 308 (12 Am. R. 200). Besides, the failure of Casey to answer the last question was sufficiently explained by his attending physician. In our opinion, therefore, the dying declarations of Casey were properly admitted in evidence.

Reversed on other grounds.

JONES v. STATE.

52 Ark. 345. (1889)

Samuel D. Jones was tried on an indictment charging him with the murder of Henry W. Keltner. He was convicted of murder in the first degree and appealed.

PER CURIAM. One of the matters argued, though not raised in proper form, is the alleged error of the court in excluding the testimony offered as to the dying declaration of Keltner. The witness says that some hours after the shooting Keltner said that Samuel Hall shot him.

A mere expression of opinion by the dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration is mere opinion appears from the statement itself, or from other undisputed evidence showing that it was impossible for the declarant to have known the fact stated. If, upon any view of the evidence, it is possible for the declarant to know the truth of what he states, his declarations, being otherwise competent, should be received and considered by the jury in the light of all the evidence.

In the case at bar it was a physical impossibility for Keltner to have seen who shot him, and the consciousness of wrong done in the killing of Hall's father made him swift to suspect Hall of the commission of the crime.

The facts in the case of Nick Walters v. State, 39 Ark. 225, were

very similar to those now before the court, and the declarations in that case were held to be properly admitted.

Affirmed.

McLEAN v. THE STATE.

16 Ala. 672. (1849)

The plaintiff in error was indicted for the murder of one Marvin Whatley.

CHILTON, J. The 2nd, 3rd, 4th and 6th assignments, which relate to the inadmissibility of the dying declarations of the deceased as evidence, may be considered in connection. It is insisted that as the deceased had not, at the time he made the declarations proved by the witness Wade, and which were made some three hours before his death, given any evidence by his declarations that he was aware of the near approach of his dissolution, the evidence should have been excluded. The law certainly requires that to render dying declarations admissible, they must be made under a sense of impending death; for it is this sense of his danger that gives to the declaration a sanction considered equivalent to an oath. But in order to show that the party was sensible of his danger, it is not indispensable that he should state it at the time he makes the declarations, or at any time. "It is enough," says Mr. Greenleaf, "that it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of his medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." Greenl. Ev. sec. 158. So in Anthony v. the State, Meig's Rep. 265, it was held, "If the dying person declare that he knows his danger, or it is reasonably to be inferred from the wound or his state of illness, that he was sensible of his danger, the declarations are good evidence." 1 East. Pl. Cr. 354, Tinckler's case; ib. 357-8, John's case; 6 Car. & P. 386; ib. 631; 7 ib. 187; Whar. Amer. Cr. Law, 179-80; Anthony v. State, 1 Humph. 265; Dunn v. The State, 2 Pike 229; 1 Phil. Ev. C. & H. notes, from page 606 to 612, where the authorities are collected, Chitty's Crim. Law, 569-70; Roscoe's Cr. Ev. 25. The circumstances under

which the declarations are made must be shown to the judge, who is to determine upon the admissibility of the evidence. 1 Greenl. Ev. sec. 160, and authorities in note 4, page 257 (3rd ed.); 1 Leach, 504; Chitty's Cr. Law, 570; Wharton's C. L. 183; 1 Stark. Rep. 532; 3 C. & P. 629. We think, under the rule of law as above laid down, and which is fully sustained by authority, the facts and circumstances shown by the proof as set out in the bill of exceptions, justified the court in admitting the declarations of the deceased. It is needless to refer to these facts further than to state, that the deceased had just been shot down, having received sixty small shot in his body, penetrating a vital part, the right breast, that considerable blood flowed externally, as well as into his chest, passing thence into his mouth; that he did not speak from the time he was shot down until taken to the house, and his wounds dressed; that he was in extreme agony and suffering. It further appears, that in a very short time after he made the declarations to the witness, Wade, he stated to another witness, Mrs. Graves, that he must die, which was repeated. Under such circumstances, if the deceased was sensible of anything, he must have been aware that death was immediately to follow, and was inevitable.

It is, however, objected to the declarations proved by Mrs. Graves that they are imperfect and were not completed by the deceased, and that not having answered all he intended answering, what he did say should be excluded. It appears that this witness, a short time before the death of the deceased, and after he stated that he was going to die, asked him who shot him—he replied, the prisoner. She then asked him the cause of it, but from weakness and exhaustion, the deceased could not and did not answer her question, but shook his head. It is no objection to such declarations, that they were made in answer to leading questions; but that the statement, whatever it may be, must be complete in itself; for if incomplete—if it appear that the dying man intended to connect his statements with qualifications and explanations, so remaining incomplete and unexplained, should be excluded from the jury. 1 Greenl. Ev. sec. 159, p. 257; Commonwealth v. Vass, 3 Leigh's Rep. 786; Rex v. Fagent, 7 C. & P. 238. The declaration, however, in this case, was complete, and it is not shown that he intended or desired to connect it with any other fact or circumstance, explanatory of it. He simply stated that the prisoner shot him, without attemping to explain the circumstances attending it.

Reversed on other grounds.

STATE v. WILLIAMS et al.

67 N. C. 12. (1872)

The prisoners were indicted in several counts, Edward Williams for the murder of Silas Avery, and Mary Ann Avery for being accessory before the fact.

It was in evidence that the deceased was shot after dark, in his house, by some one standing outside, through an aperture between the logs of which the house was built. He was sitting by the fire, with his side near the aperture, and was shot in the side.

On the trial, the State proposed to give in evidence the dying declarations of the deceased. Upon examination of witnesses as to his condition at the time of the declarations, and the circumstances attending them, his Honor held that the deceased was *in extremis*, and the declarations were admissible as dying declarations. Thereupon a witness Lucina Wainwright, was permitted to state the declarations of the deceased, to wit: that he knew who shot him. It was Edward Williams who shot me, though I did not see him." The witness further stated that, in reply to a question asked the deceased by her as to who shot him, he said, "I don't know what those poor creatures shot me for; it was Ed. Williams who shot me, but I did not see him." The counsel of the defendants excepted to the admission of the testimony. They contended that the declarations should be entirely excluded from the jury; but the court ruled that they were admissible, under the circumstances, for what they were worth, and charged the jury to be careful in weighing these declarations, but to consider them in connection with the other testimony in the case, and give them what weight they were entitled to. Defendants' counsel again excepted.

Verdict of guilty. Rule for a new trial discharged. Judgment, and appeal by the defendants.

RODMAN, J. The admission of dying declarations is an exception to the general rule of evidence, which requires that the witness should be sworn and subject to cross-examination. The solemnity of the occasion may reasonably be held to supply the place of an oath. But nothing can fully supply the absence of a cross-examination. In consequence of this absence, such declarations are often defective and obscure. Hence, several Judges have felt it a duty to say that they should be received with much caution, and that the rule which authorizes their admission should not be extended beyond the reasons

which justify it. (See note to Rex v. John, 2 Leading Crim. Cases 396. Regina v. Hinds, Bell, C. C. 256. Regina v. Jenkins, Law Rep. 1 C. C. 1 Phil. Ev. 292, and opinion of Lord Denman in Sussex Peerage Case, 11 Clark & Fin. 112.) And this is the more important as such declarations when received, have great, and sometimes undue weight with juries.

It is settled on authority and is consistent with reason, that if the declarant would not have been permitted to testify had he survived either because he was too young to comprehend the nature of an oath, or was disqualified by infamy, or imbecility of mind, his dying declarations are inadmissible. Rex v. Pike, 3 Car. & P. 598. Regina v. Perkins, 2 Moody C. C. 135. Rex v. Drummond, 1 Leach C. C. 337-38.

It is equally clear that such declarations are admissible only to those things to which the declarant would have been competent to testify if sworn in the case. Consequently, if they be not the statement of a fact, but merely the expression of the opinion of the deceased, they are inadmissible. And so, if merely hearsay, or irrelevant. 2 Lead. Cr. Cas. 404. Rex v. Sellers, Carrington's Crim. Law, 233. Oliver v. The State, 17 Ala. 587. Johnson v. The State, Id. 687.

It is contended for the prisoners, that the declarations in this case were nothing more than the expression of an opinion or belief.

The case states that Lucina Wainwright testified that the deceased said: "He knew who shot him. To which she replied that she did not know. Then deceased said, it was Edward Williams, though I did not see him." Further, in reply to a question by witness as to who shot him, deceased said, "I don't know what those poor creatures shot me for. It was Ed. Williams who shot me, thought I did not see him."

The case further states, that the deceased was shot after dark, while sitting in his house at the fire-place; with his right side near an aperture between the logs of the outer wall, about three inches wide. The shooting was done through the aperture by some person standing on the outside of the house. The wounds were in the right side and wrist.

It was said for the State that every allegation of the identity of a person is necessarily the expression of an opinion only, because it is a conclusion drawn from a comparison of the appearance of the person at one time, with the recollection of his appearance at some other time. This is true; but the admission of such evidence

is an exception to the general rule excluding opinions, founded on the necessity of the case. Best on Evidence, sec. 349.

But there must be some limit to the exception; a witness cannot be allowed absolutely to substitute his judgment for that of the tribunal to whom the law has committed the decision of the fact. Best Ev. sec. 344-5-6. We think the limit may be drawn without any difficulty, and consistently with the habitual practice of courts. Whenever the opinion of the witness upon such a question, or on one coming under the same rule, is the direct result of observation through his senses, the evidence is admitted. As, for example, when a witness has seen a person or object at several times, and expresses his opinion as to the identity of what he saw at one time with what he saw at another, as human language is inadequate to convey to the mind of another person fully and accurately the impression made upon the mind of the witness through his sense of sight, his opinion, as the result of that impression is admitted and is entitled to more or less weight according to the circumstances. And although opinions, as derived, may sometimes be erroneous, yet they are not generally so, and when carefully weighed are sufficiently reliable for practical use in the ordinary affairs of life. The witness does not unnecessarily substitute his judgment for that of the tribunal.

But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. As, for example, if at the time to which the question of identity is applied he did not see or have the testimony of any sense as to the person in question, but believed it to have been him because he might have been there, and had a motive to have been there and to have done the act alleged. In such a case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of the law, it alone is competent to do so. To allow any influence of the opinion of the witness would be *unnecessarily* to substitute him to the function of the tribunal.

Now to apply these views to the language of the deceased, must his words reasonably be understood to express an opinion as to the identity of his assailant with the prisoner, as the direct result of observation through his senses, or any of them? The deceased accompanied each declaration that it was Williams with the qualification, "but I did not see him." He appears to have had in his mind an idea of the distinction which I have been endeavoring to draw, and to have wished to exclude the conclusion that his opinion was anything more than one founded on an inference from facts and

motives which he may have supposed to exist, but which even if they were in evidence on the trial (as to which the case is silent), do not affect the present question. The deceased excludes sight as a source of his opinion. A court is not at liberty to conjecture, that he might have heard the prisoner and identified him in that way, especially as there is no suggestion of that sort in the evidence.

We think that, whether we take the words of the deceased alone, or in connection with the circumstances of the assault, they do not purport, and were not meant to state, the identity of Williams with the assailant, as a fact known through the senses, and that, consequently, they were inadmissible.

The learned counsel who represented the State cited State v. Arnold, 13 Ire. 184, as in point. There is an obvious distinction between that case and this. In that, the deceased did not say that he did not see the prisoner; and it was possible that he did see him. The evidence in that case also suggested the possibility that his sense of hearing contributed to his identification of the prisoner. Moreover, in that case the exclamation of the deceased, being immediate upon the shooting, was admissible as part of the *res gestæ*. 1 Greenl. Ev. sec. 156. Com. v. McPike, 3 Cushing, 181. State v. Shelton, 2 Jon. 360.

It was contended for the State that as upon the face of the declarations of the deceased, it was possible that he might have identified the prisoner through hearing, the Judge ought to have left them to be weighed by the jury and disregarded if worthless. But it is the inflexible rule that the Judge must decide all preliminary questions touching the competency of evidence. The instances and authorities for this are so numerous and familiar that it is unnecessary to refer to them.

From this, however, it is contended that the decision of the Judge in this, as in analogous cases, comprised a decision both of fact and of law.

1. Of fact; as to what were the declarations of the deceased, and as to the circumstances under which they were made.

2. Of law; were the declarations admissible alone, or in connection with the circumstances?

On the first question the Judge's finding was final. On the second it was subject to review.

I will give a single illustration only of the doctrine here stated. The declarations of a deceased person, made in contemplation of impending death, are admissible. It is settled that the Judge passes

upon the preliminary question of their admissibility. It is equally well settled that in doing so he finds the circumstances under which they were made; and also whether, considering the circumstances, they were made in contemplation of impending death. This last is a question of law. Regina v. Smith, Leigh & Cave, C. C. 627. Donnelly v. State, 2 Dutcher, 601. Starkie v. The People, 17 Ill. 24-25. Rex v. Welbourn, 1 East. P. C. 358. Rex v. Hucks, 1 Stark. 523. 2 Crim. Cases, 400. The State v. Arnold, *ubi sup.*, is also to that effect.

We think, therefore, that the Judge properly undertook to decide the question of admissibility; but that (for the reasons given) he decided it erroneously.

READE, J. *Dubitante.*

PER CURIAM. *Venire de novo.*

COMMONWEALTH v. MATTHEWS.

89 Ky. 287. (1889)

HOLT, J. William Matthews was tried upon the charge of manslaughter for killing Henry Alves by shooting him. The jury failing to agree, were discharged, and there has never been any final disposition of the case. During the progress of the trial the Commonwealth excepted to certain decisions of the court upon legal points, and by this appeal questions their correctness.

The accused was allowed over the objection of the Commonwealth, to prove as a dying declaration what the injured party said after the shooting as to the circumstances of it. It is urged that the proper foundation was not laid for its introduction, and that the statement was in itself incompetent. It was proven that about fifteen minutes after he was shot the deceased, when lying upon the ground bleeding and suffering, said that he hoped he would live long enough to take the gun home, and that he died in about twenty minutes. The witness says that he did not say whether he believed he would die or recover, and that he (the witness) did not know whether he was conscious or not when he made the statement.

It is well settled that a statement to be admissible as a dying declaration must be made when the party is *in extremis*, and has given up all hope of this life; but whether this be so or not may be de-

termined not only by what he may say, but by his evident danger and all the surrounding circumstances. The injured party need not, in express words, declare that he knows he is about to die, or make use of equivalent language. (Peoples v. Commonwealth, 87 Ky. 487.)

Tested by this rule, we think the statement in this instance was made under a sense of impending death and that what the injured party then said also shows he was conscious not only of it, but of what he was saying as to the transaction. The statement, in substance, was that he and the accused were playing and that it was an accident.

To be competent as a dying declaration, the statement must not only relate to the immediate circumstances of the transaction resulting in the injury, but it must detail facts, and not the opinion of the declarant. In our opinion, the statement in this instance conforms to this rule. It is unlike the case where the injured party declared that he had been killed for nothing. This was purely his opinion and inference. Here the injured man said that he and the accused were engaged in play, and that the shooting was an accident. This, in our opinion, was the statement of a fact, more than the giving of an opinion, and the court properly allowed it to be proven.

This opinion is ordered to be certified to the lower court.

MOORE v. STATE.

12 Ala. 764. (1848)

The plaintiff in error, was indicted and convicted, in the Circuit Court of Tallapoosa County, for the murder of her husband. In the course of the trial, a bill of exceptions was taken, and this cause brought to this court by writ of error.

The bill of exceptions discloses the following facts. The wounds of which the deceased died, appeared to be given with the edge of an axe; one of them was on the front of the head, on the left side, and in length about the width of an axe; that it cut through the skull into the brain. His physician reached him within thirty-six or forty hours after the wound was inflicted; he was breathing, but insensible. The wound was dressed, and the deceased appeared to revive. He was asked if he felt better, to which he replied no. These were facts deposed to by the physician, who also stated that he thought him in

his right mind, but said that a man whose brain had been injured, as his had, might speak rationally one moment, and be entirely out of his mind the next.

The State then offered a witness, to prove, that on the evening of the same day he took some nourishment to the deceased, and requested him to eat, stating that if he would he would get well. The deceased shook his head, and said no. The witness then said to him, "do you know that Mrs. Moore done it?" The deceased answered "oh yes, well enough—well enough." To this evidence, the prisoner objected, but the objection was overruled. The deceased lived some four or five days after the above declaration was made; and another witness testified that some days after the above declaration was made, the deceased stated, that Mrs. Moore "did not do it."

The court charged the jury, that the dying declaration of the deceased owing to the condition of his mind, at the time they were made, should not be regarded by them, as he spoke but little, and in detached sentences. At any rate, that what one witness stated, was neutralized by what was stated by the other, if they were of equal credibility, and that they should not operate against the accused. To which charge the prisoner excepted; and the bill of exceptions, with the matters therein contained, are here assigned for error.

DARGAN, J. It is well settled, that in the trial of cases for homicide, the declarations of the deceased, made under the belief that his end is near, are admissible, not only to designate the party who committed the crime, but also to detail the circumstances under which it was done. But these declarations must be made when the belief of death is present to the mind of the declarant, and when he believes there is no hope of recovery, but that he must die of the wounds or injury received. Declarations made under such circumstances are considered as made under circumstances equally solemn as if made under the obligations of an oath, and are admissible. But it is the duty of the court to determine, in the first place, upon the admissibility of such declarations, and then it is for the jury to determine upon the weight or credibility of them. (1 Greenl. Ev. 190.)

The facts disclosed by the record, in this cause, must satisfy any mind that the declarations were made at a time when the deceased was without hope of life, on earth, and under the belief of impending death. There was no error, therefore, in permitting the declarations to go to the jury.

But it is objected, that the relation of husband and wife, existing at the time between the accused and the deceased, rendered the dec-

larations incompetent proof. This is not the law. One of the first cases in which the question arose, upon the admissibility of dying declarations, was that of Woodcock, and the deceased was his wife. Her declarations were received as evidence. (2 Starkie Ev. 458.) And it is well settled that a wife may be a witness in a criminal proceeding against her husband for injuries done to her person; and there is no reason whatever, why a husband should not be a competent witness against his wife, for injuries done him. But in the charge of the court, as given, there is error. It must be borne in mind, that the evidence showed, that the deceased might be rational at one moment—insane or irrational at another. On one day he said, in answer to the question, "do you know that Mrs. Moore did it?" "Oh yes, well enough, well enough." At a subsequent day it was testified, that he said she "did not do it." It may be fairly inferred, that at one time he accused her as the guilty agent, and at a subsequent time acquitted her of guilt.

We conceive the rule to be, that the dying declarations of the deceased may be given in evidence, as well to acquit as to convict the accused, and they are not limited, as evidence in favor of the State alone. (See Greenl. Ev. 190; Rex v. Scaife, 1 Mood. & R. 551.)

Here the declarations of the deceased were inconsistent with each other. There was then a direct conflict of testimony. It was the province of the jury to weigh the testimony, to reconcile it if they could, and if it could not be, then to determine which to believe. The declarations of the deceased, if made, as stated in the bill of exceptions were in direct conflict with each other, and it was the duty of the jury to determine which declaration was true, or to which they gave credit as true. The charge of the court took from them this duty, and determined that the contradictory declarations of the deceased neutralized each other. Whether they did or not, or whether either, or which one was true, was by law, the duty of the jury to determine—not that of the court; and for this error, the cause is reversed, and remanded, that the prisoner may be again tried, unless in the mean time, she be discharged by due course of law.

STATE v. BELCHER.

13 S. C. 459. (1880)

McGOWAN, A. J. William Belcher was indicted for the murder of his wife, Elizabeth. The indictment contained two counts, one for murder by actual violence—beating and kicking—and the other by neglecting to provide necessaries for her when she was sick and helpless, from which neglect she died. The jury found him guilty on the first count, and he appeals to this court for a new trial.

The first and second exceptions relate to the admissibility of the statements of the deceased as proved by Dr. Harrison and will be considered together. The judge reports that "Dr. W. A. Harrison testified that he visited deceased as a physician, April 21st, 1879; was called in to see her at Dr. Nesbitt's; she was suffering pain and in a wretched condition; made an examination; found her general appearance indicated anemia; her appetite was good; she may have been in that condition for months. She said her condition was caused by her husband; he threw her down; jumped on her womb, and there remained on her; beat her on her breast and sides. She had been in the condition in which he then saw her ever since. She thought, at the time she would then die. The doctor then gave his opinion that the effects she exhibited would follow the treatment she said she received. This physician further said that the deceased was suffering from peritonitis (chronic), and had some symptoms of cancer. He mentioned symptoms of both diseases, in detail, and concludes, that, in his opinion as a medical man, the woman died from the treatment she received from her husband." The admission of this testimony was objected to, and the objection is renewed here upon several grounds. First. It is insisted that this statement of the deceased should not have been received, for the reason that the deceased was the wife of the accused, and if living, would not have been a competent witness against her husband, being excluded by section 415 of the code. The preamble of the code declares that "the second part relates to civil actions in the courts of this state." The first sub-division of Sec. 415 provides, generally, that "the husband and wife shall be competent and compellable to give evidence, the same as any other witness, except as hereinafter stated." The second sub-division, manifestly for the purpose of excluding the inference that the provisions of the section might be construed as applying to criminal actions, declares that "nothing herein contained shall render

any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding, except," &c. These provisions, taken together, leave the law of evidence in criminal proceedings unchanged, and by the common law, the declarations of the wife, *"in articulo mortis"* are admissible against the husband on trial for the murder of his wife. 1 Phil. Ev. 251; Roscoe's Cr. Ev. 118.

The evidence is also objected to on the ground that they were not "dying declarations." Hearsay is evidence of facts with which the witness is not acquainted, but which he merely states from the relation of others, and is inadmissible for the double reason that the party originally stating the facts does not speak under oath, and the party against whom the evidence is offered has no opportunity to cross-examine the party making the statements. The only case in the whole range of the criminal law where evidence is admissible against the accused without an opportunity of cross-examination, is that of "dying declarations" in cases of homicide, and they are only admissible from the necessity of the case, and when made in extremity—when the party is at the point of death, and conscious of it—when every hope of this world is gone, and every motive to falsehood is silenced by the most powerful considerations to speak the truth. For the reason that the admission of such statement is exceptional, they ought always to be excluded unless they come within the rule in every respect. State v. Quick, 15 Rich. 342; State v. McElvoy, 9 S. C. 211; Roscoe's Cr. Ev. 31. The testimony of Dr. Harrison as to the statements of the deceased to him, does not come within the definition of dying declarations, and was mere hearsay. He did not witness the acts complained of, but only related what she told him had taken place. She was afflicted with a lingering disease. Her statement was made April 21, and she did not die until July 12, nearly three months after. It does not appear that the statement was made in extremity; she said she thought at the time the violence was inflicted that "she would then die," but she did not say that, at the time she made the statement, she considered herself in the very presence of death—soon to occur.

The judgment of the Circuit Court is set aside, and a new trial granted.

WILLARD, C. J., and MCIVER, A. J., concurred.

DAVIS v. COMMONWEALTH.

95 Ky. 19. (1893)

CHIEF JUSTICE BENNETT delivered the opinion of the court.

The appellant having been convicted of the crime of murdering Viona Pack by the Lawrence Circuit Court, he appeals and complains as follows: First, that the court erred in not allowing him to prove by G. W. Miller that Granville Pearl confessed to him on his death-bed that he, Pearl, killed Viona Pack. It seems to us that admissions and confessions as to competency stand upon the same footing. Admissions cannot be used in evidence, except against the person making them in an issue between him and another person, wherein the truth of the admissions is involved, or against his privies claiming through him. And confessions are incompetent evidence except against a person charged with crime, or, in a proper state of case, against his confederates. Nor is the proposed evidence competent as a dying declaration, because such evidence is only competent when it comes from a declarant whose personal injuries by another have resulted in death, and the declaration must be confined to the manner and circumstances of the injury and to the person that did it.

The judgment is affirmed.

DECLARATIONS RELATING TO PEDIGREE.[1]

FULKERSON v. HOLMES.

117 U. S. 389. (1885)

This was an action of ejectment. The defendants in error were the plaintiffs in the Circuit Court, and were the heirs at law of John Holmes, deceased. They brought the action in August, 1871, to recover a tract of three thousand acres of land in Lee county, in the state of Virginia. The defendants pleaded the general issue. The case was tried by a jury, and there was a verdict for the plaintiffs, on which the court rendered judgment and the defendants sued out this writ of error.

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[1] Hughes on Evidence, p. 72.

It appeared from the bill of exceptions that the plaintiffs, to sustain the issue on their part, offered in evidence a patent from the Commonwealth of Virginia to Samuel Young, dated May 7, 1787, for the premises in controversy, which was admitted without objection.

They next offered a deed for the same premises from Samuel C. Young to John Holmes, dated July 2, 1918. This deed recited the grant by the Commonwealth of Virginia to Samuel Young of the premises in controversy, that Samuel Young, the patentee, had died intestate, that Samuel C. Young, the grantor, was his only child and heir, and that the title to said lands had vested in him. Appended to the deed was a certificate of acknowledgment, dated July 15, 1819, at the Eastern District of Pennsylvania, purporting to have been taken by Richard Peters, United States judge for the district of Pennsylvania, and signed by him. The deed appeared also to have been witnessed by John Shaw and John Craige. Immediately after the certificate of acknowledgment appeared what purported to be the receipt of Samuel C. Young for the consideration money mentioned in the deed, which was $10,400 signed by him and witnessed by John Craige. The plaintiffs proved the handwriting of Judge Peters to the certificate, and the death of John Shaw, one of the witnesses, which took place more than fifty years before the trial. Appended to the deed was the following certificate of registration:

"Virginia: At the court begun and held for Lee county, at the court-house thereof, on the 15th day of January, 1838, this indenture of bargain and sale for land between Samuel C. Young, of the one part and John Holmes of the other part, was admitted to record upon the certificate of Richard Peters, judge of the Pennsylvania district of the United States.

J. W. S. MORRISON, D. C."

The deed bore the following indorsement:

"Recorded in the clerk's office of the County Court of Lee, in book No. 7, page 401.

"Teste: J. W. S. MORRISON, D. C."

MR. JUSTICE WOODS delivered the opinion of the court. He stated the case and continued:

It is first assigned for error that the Circuit Court "allowed the deed from Samuel C. Young to John Holmes to be read in evidence without instructing the jury that the recitals therein in respect to the death of Samuel Young and the heirship of Samuel C. Young were not evidence against the defendants, even if it were admissible at

all, without proof of its execution or possession accompanying and held under it."

The deed of Samuel C. Young to John Holmes was rightfully admitted in evidence, as an ancient deed, without proof by the subscribing witnesses, or of possession by the plaintiffs or those under whom they claimed. When offered it was more than sixty years old; it was produced from the custody of the heirs of John Holmes, the grantee, who claimed the lands described therein. It, as well as the patent for the same land from the Commonwealth of Virginia to Samuel Young, was shown to have been found among the papers of John Holmes. The lands described therein were shown to have been listed for taxation to John Holmes, or to his heirs, for a period beginning with the year 1838 down to and including the year 1875, which was after the bringing of this suit; and it appeared that during that time they had paid the taxes assessed on said lands, or the same had been released to them by law. It was further shown that the judge before whom the acknowledgment of the deed had been made was dead; that his signature to the certificate of acknowledgment was genuine; that the deed had been recorded in the county where the lands lay for more than forty-two years before it was offered in evidence; and that before and after the deed was put upon record the lands described therein were reported to be the lands of John Holmes, the grantee, and his heirs, and were known and designated in the neighborhood where they lay as the "Holmes plantation."

This state of facts amply justified the admission of the deed in evidence as an ancient document, without other proof. Caruthers v. Eldridge, 12 Gratt. 670; Applegate v. Lexington & Carter County Mining Co., decided in the present term, *ante*, 255, and the cases there cited.

The question is, therefore, fairly presented, whether the recitals made in the deed of Samuel C. Young to John Holmes, to the effect that Samuel C. Young, the patentee, had died intestate, leaving one child only, namely the said Samuel C. Young, the grantor, were admissible in evidence against the defendants, who did not claim title under the deed.

The fact to be established is one of pedigree. The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial and were known to but few persons, it is obvious that the

strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. Taylor on Evidence, ed. 1872 sec. 571. Traditional evidence is, therefore, admissible. Jackson v. Browner, 18 Johns. 37; Jackson v. King, 5 Cowen, 237; Davis v. Wood, 1 Wheat. 6. The rule is that declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. Jewell v. Jewell, 1 How. 219; Blackburn v. Crawfords, 3 Wall. 175; Johnson v. Lawson, 2 Bing, 86; Vowles v. Young, 13 Ves. 140, 147; Monkton v. Attorney-General, 2 Russ. & Myln. 147, 159; White v. Strother, 11 Ala. 720. A qualification of the rule is, that, before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. Monkton v. Attorney-General, 2 Russ. & Myln. 147, 156; Attorney-General v. Kohler, 9 H. L. Cas. 653, 660; Rex v. All-Saints, 7 B. & C. 785, 789. But it is evident that but slight proof of the relationship will be required since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.

Applying these rules, we are of opinion that the recital in the deed of Samuel C. Young to John Holmes, supported as it was by the circumstances of the case shown by the evidence, was admissible, as tending to prove the facts recited, namely, that Samuel Young the patentee was dead, and Samuel C. Young, the grantor, was his only child and heir.

Judgment affirmed.

BLACKBURN v. CRAWFORDS.

70 U. S. 175. (1865)

Dr. Crawford, of Prince George's County, Maryland, died *intestate* in December, 1859, the proprietor of large landed estates there; Greenwood Park, Waring's Grove, Federal Hill, Westphalia, Ranleigh, &c. He left no wife, nor child, nor brother nor sister surviving him. Claimants to such estates, however, were not long wanting. On the one hand were relatives of the name of Blackburn, confessedly his cousins-german; on the other persons bearing his own respectable Scottish name of Crawford; George Thomas Crawford, Mary Eliza-

beth Crawford, Sarah Jane Crawford, and Anna Victoria Crawford, the children of a brother Mr. Thomas B. Crawford, who had died before him. The title of these children—as nephew and nieces, and nearer of course than cousins—was clear, but for a single difficulty; the fact that their *legitimacy* was called in question. It was asserted that their mother had been the mistress, not the wife of their father. The intercourse of the parties had, confessedly, in its origin been irregular; but the allegation was that a marriage had subsequently taken place.

To prove the marriage, the counsel of the children, the plaintiffs in the case, offered in evidence the deposition of the Rev. J. P. Donelan, to prove that he had frequently heard Sarah Evans say that Mr. T. B. Crawford and Elizabeth Taylor were married. In order to lay a foundation for this testimony, it was proved *aliunde* that Sarah Evans was the sister of Elizabeth Taylor, and that she had been dead several years. The testimony was admitted, under objection by the other side.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The first exception relates to the admission of evidence as to what Sarah Evans had said in regard to the marriage of her sister, Elizabeth Taylor with Mr. Crawford. Was the testimony rightly admitted?

Greenleaf says: "It is now settled that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person *from whom the descent is made out,* and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question."

It is well settled, that before the declarations can be admitted, the relationship of the declarant to the family must be established by other testimony.

Here the question related to the family of Dr. Crawford. The defendants in error claimed to belong to the family, and to be his nephew and nieces. To prove this relationship, it was competent for them to give in evidence the declarations of any deceased member of that family. But the declarations of a person belonging to another family—such person claiming to be connected with that family only by the intermarriage of a member of each family—rests upon a different principle. A declaration from such a source of the marriage which constitutes the affinity of the declarant, is not such evidence *aliunde* as the law requires.

It is insisted by the defendants in error, upon the authority of Moncton v. The Attorney General, That it was sufficient to show the relationship of the declarant to Elizabeth Taylor. As we understand that case, it has no application to the point under consideration. None of the writers on the law of evidence have given it so wide a scope. Hubback thus states the principle which it decides: "It is sufficient that the declarant be connected by extrinsic evidence with one branch of the family touching which his declaration is tendered." Lord Brougham himself said in that case: "I entirely agree that, in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the persons making them, with the family. To say that you cannot prove the declarations of A., who is proved to be a relation by blood of B., touching the relationship of B with C., unless you have first connected him with C, is a proposition which has no warrant, either in the principle upon which hearsay is let in, or in the decided cases." If it had been proved by independent testimony that Sarah Evans was related by blood to any branch of the family of David Crawford, and her declarations had been offered to prove the relationship of another person claiming, or claimed to belong also to that family, this case would be in point. But the declaration of Sarah Evans, offered to prove that her sister was connected by marriage with a member of that family, was neither within the principle nor the language of that authority.

In Edwards v. Harvey an issue out of chancery was directed to try the question whether "A. B., from whom the plaintiff claimed, was not proved to be related to C. D., who was the granting party in the conveyance of the plaintiff.' A new trial was moved for, on the ground that the court had rejected a paper offered in evidence by the plaintiff. "It was a pedigree drawn out by Bridget Lloyd, a maiden lady, deceased, showing that C. D., who was her relative was related to A. B." The master of the rolls "refused a new trial, because if Miss Bridget Lloyd's pedigree, written by herself, were evidence for her relation, so would her declaration have been, to show that she was herself entitled to the estate."

In Doe v. Fuller, Chief Justice Best said: "If there were no other evidence than the declarations of John to show that James was a member of the family, they could not have been received, as that would be carrying the rule as to the admissibility of hearsay evidence further than has ever yet been done, viz., *to allow a party to claim an alliance with a family by the bare assertion of it.*"

We think the court erred in admitting the testimony.

Judgment reversed, with costs, and the case remanded to the Circuit Court, with an order to issue a *venire de novo.*

HARLAND v. EASTMAN.

107 Ill. 535. (1883)

This is an action of ejectment brought by appellee, against appellant, claiming title in fee to lot 45, block 37, in school section addition to Chicago, and for the possession thereof. The plea is not guilty.

Plaintiff claims that one Abraham B. Adams was the owner in fee, and seeks to show title in himself through three deeds, executed, one by Enoch E. Adams, one by Alfred A. Adams, and one by Adelaide B. Pate, each purporting to convey to plaintiff an undivided one-third of said lot. The proof shows that Abraham B. Adams died in 1872 or 1873, and these deeds were made in 1880 and in 1881. To show title in plaintiff it was necessary to show title in these grantors. To do this he undertook to prove that these three grantors constituted the only heirs at law of Abraham B. Adams, deceased. To this end he introduced as a witness J. C. Tucker, who testified that he lived in Chicago from 1856 to 1860, "and off and on then until 1875," when he moved back to Chicago, and had lived there ever since; that he knew Abraham B. Adams in his lifetime; first saw him in 1863; he then lived on this property and had a wife living with him, and witness saw him once afterwards, two to five years later; that witness knew two of his children; that there were three, Enoch E., Alfred A. and Sarah; that Sarah was married, and afterwards died, some thirty years ago,—before the witness knew the family; that witness married a daughter of Enoch E. Adams,—a grand-daughter of Abraham B. Adams; that when Sarah died, she left one child, who married one A. B. Pate, and is now living, and is Mrs. A. B. Pate; that Sarah left no other child. (At this stage of the testimony defendant moved to exclude from the jury this testimony as to Sarah and her children. The motion was denied and defendant excepted.) The witness further testified that Enoch Adams and Alfred are both living, now, in the State of Illinois, and that Mrs. Pate lives in Ohio.

On cross-examination the witness stated, that when he first saw Abraham B. Adams, in 1863, the wife of witness was with him, and they stayed about two hours; that witness then lived at Cincinnati

and had never seen him before, and on the subsequent visit he stayed about an hour,—and this is all the acquaintance he had with him; that he has no personal knowledge of his death or his wife's death; that he never saw Sarah ,or knew her or her family, or of her death, except from the relatives of the wife of witness; that he never heard that Sarah ever had more than one child; that Abraham B. Adams was married twice; that Alfred A., Enoch E., and Sarah were all children by his first wife; that when witness called, as above stated, Abraham B. Adams was living with his second wife; that witness never heard of any children by her. The witness then stated that *all* he knew about these things was hearsay, from his wife and relatives.

DICKEY, J. The motion for a new trial ought to have been sustained. The testimony in the case palpably failed to show that the three grantors in the deeds to plaintiff were the heirs, and only heirs, of Abraham B. Adams. Facts involved in a question of pedigree may be established by proof of general reputation in the family, or by proof of what deceased members of the family have said. From the necessity of the case, hearsay evidence of certain kinds is admissible in establishing matters of pedigree, and this because it is the best evidence of which the nature of the case admits. What has been said by deceased members of the family is admissible, upon the presumption that as such members they knew, from general repute in the family, the facts of which they speak. Now while such a presumption as to the husband of a grandchild of the intestate may, under some circumstances, prevail, still when on cross-examination, it is shown that two of the children of the intestate are living, and within the reach of the process of the court, it will not do to say that the testimony of such a witness shall be deemed sufficient where he shows he has no personal knowledge on the subject, and fails to show a general reputation in the family in support of what he has heard and merely says he learned so and so from conversations with his wife and her relatives. Such conversations have been such in extent and variety, and may have been held under such circumstances, as to enable a witness to say that such was the reputation in the family, but such conversation may not have been such. The witness surely could not be permitted to swear to any specific thing which his wife, or either of her uncles, had said in his hearing, because they are all living, and their sworn testimony is better than their unsworn statements, unless all of them taken together, with their surroundings, enable him to say such was the accepted state of the case in the family, or such was the uncontradicted repute in the family.

Again while the witness says Abraham B. Adams had three children (Enoch, Alfred and Sarah), he nowhere says distinctly, that these were his *only* children; and while he undertakes, in speaking of Sarah, the aunt of his wife, who died many years before the witness knew the Adams family at all, to say she left only one child who is still living, and the wife of one A. B. Pate, he nowhere tells the given name of that child, or shows that she was the *Adelaide B. Pate* who made the deed to plaintiff. If it be true that the several grantors in these three deeds were really the only heirs at law, it can readily be proven by these three living witnesses. While the witness produced is a relative of deceased (Adams) by marriage, yet his own testimony shows that his association with the family was so slight that the presumption arising from that relation of his knowledge on the subject is entirely rebutted by his own statements. For this reason, if for no other, the judgment ought to be reversed, and another trial had.

The judgment is reversed and the cause remanded.

FLORA v. ANDERSON.

75 Fed. Rep. 217. (1896)

SAGE, District Judge. The complainant sues to recover two-twelfths of the estate of Nicholas Longworth, claiming as the illegitimate son of Eliza Longworth Flagg, under the will of Nicholas Longworth, her father, executed on the 25th of March, 1859 and under the codicil thereto, executed on the 15th day of January, 1862, whereby he devised to Larz Anderson his son-in-law, and to Joseph Longworth, his son, who were named as executors, two-twelfths of his estate, in trust for the benefit of his daughter, Eliza Longworth Flagg, during her life with remainder to "the issue of her body surviving her," and in default of such issue to his son, Joseph Longworth, and his grandson, John L. Stettinus. Nicholas Longworth died on the 17th of Feb. 1863. Eliza Longworth Flagg died December 13, 1891, without issue of her marriage. To maintain his claim, the complainant must establish: First, that he is the illegitimate son of Eliza L. Flagg; and, second, that if so, he is entitled under the will to the remainder devised to "the issue of her body surviving her."

The law resorts to hearsay evidence in cases of pedigree upon the ground of the interest of the declarants in the persons from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons who were related by blood or marriage to the person, and in that way interested in the succession in question. Greenl. Ev. sec. 103.

The rule that hearsay is admissible in cases of pedigree is limited to cases of legitimate relationship. In such cases the presumption is that declarations by deceased members of the family are true, because ordinarily there is no motive for false statements, as there is likely to be in cases of illegitimacy. In Crispin v. Doglioni, 3 Swab. & Tr. decided by Sir C. Cresswell in 1863, the question was as to the right of succession to property, the decedent having been a citizen of Portugal, where under the law, bastards inherited from the father in default of lawful issue. The plaintiff claimed to be the bastard son of the decedent, and therefore entitled under the law of Portugal, to his personal property. The defendant was a sister of the decedent, and denied that the plaintiff was his son. The declarations of a brother of the deceased, tending to show that the plaintiff was the bastard son were offered. The judge said:

"I can well understand that where a matter is likely to be discussed and well known in a family, a member of the family my be allowed to give evidence of it; but in this case plaintiff, according to his own account, is *filius nullius* by our law. The question is whether a declaration of one member may be admitted to another member of having had intercourse with a woman and having had a child by her. I think it ought to be excluded."

Where a relationship is acknowledged as a matter of fact, and its lawfulness is only disputed, hearsay from members of the family may be introduced to show that such relationship was lawful or was not lawful. But hearsay cannot be introduced to establish an unlawful relationship *per se,* where a lawful relationship is not claimed. There are cases in which testimony as to declarations of members of the family have been admitted to show that the claimant was a bastard. But on examination it will appear that in those cases the testimony was introduced, not to show bastardy *per se,* as a ground of claim, but to dispute a claim of legitimacy. Vowles v. Young, 13 Ves. 147; Goodright v. Moss, Cowp. 593; Murray v. Milner, 12 Ch. Div. 845; Jewel v. Jewel, 1 How. 219; Haddock v. Railroad, 3 Allen, 298. In Doe v. Barton, 2 Moody & R. 28, the declarations of illegitimate re-

lations were rejected. See, also, Barnum v. Barnum, 42 Md. 251, 304; Richmond v. State, 19 Wis. 307; and Shoppert v. Nierle (Neb.) 63 N. W. 383. The only exception to the rule is in India, where, under Act 2 of 1855, sec. 47, declarations of illegitimate members of the family, and also of persons who, though not related by blood or marriage to the family, were intimately acquainted with its members, were made admissible after the death of the declarants in the same manner and to the same extent as those of deceased members of the family. But that is a statutory rule. Whether illegitimacy is reputable in that country, and the statute was for that reason enacted, or whether it was enacted because Great Britain makes her experiment, in legislation as in other matters upon her colonies and dependencies, it is not of importance to inquire. Under the application of the rule in force here, what was left of complainant's case under the first proposition of law is entirely barren of proof.

The Bill will be dismissed at the cost of the complainant.

INHABITANTS OF NORTH BROOKFIELD v. INHABITANTS OF WARREN.

82 Mass. 170. (1860)

Action of contract for the support of William M. Chickering, a pauper.

At the trial in the Superior Court before Lord, J. the plaintiffs introduced evidence tending to show that Harvey Chickering, the pauper's father, was the legitimate son of Nathaniel Chickering and Ruth Richardson (who as was agreed, were married in Connecticut on the 22nd day of February, 1804), and that Nathaniel gained a settlement in the defendant town under the St. of 1793. The defendants, to prove that Harvey was born before the marriage of his parents, and was therefore illegitimate, called a witness who testified that, in the fall of 1803, in company with her aunt, Mrs. Blair, she made a visit to a relation who lived near the house in which Ruth Chickering was then living, and while there saw Harvey Chickering, then an infant two or three weeks old; that she remembered the date from the fact that Mrs. Blair's only daughter, named Susanna, was with them and was about a year old, and this daughter was born in September, 1802, and died on the 12th of Dec. 1803; and

that she had been kept in remembrance of the date of Susanna's death by constant intercourse with her family since and by frequent reference to the family record. The Blair family was not related to the Richardson or the Chickering family.

The defendants then offered as evidence that Susanna died on the 12th of Dec. 1803, a large ornamented sheet of parchment, bearing the inscription "family record," on which were entered the dates of the birth and marriage of Susanna Blair's parents, the dates of the birth and death of Susanna, and of the births, marriages and deaths of two sons born subsequently of the same parents. One of these sons, forty-seven years old, testified that, ever since his earliest recollection, his father had kept this parchment framed and hanging in a conspicuous place in his dwelling-house, and had handed it down to him; that during all this time the same entries had been on it; and that his father and mother were dead. And there was evidence that the entries of the births and deaths upon the parchment were made, all at one time, by direction of Susanna's father, more than forty years before the trial; that the record of the marriages of his children had been added, from time to time as they occurred; and that he and his son kept and exhibited the parchment as a true statement of the events recorded on it.

The defendants also offered to prove that an ancient grave-stone in the burial-ground of the Blair family bore the name of Susanna, and had inscribed on it December 12th, 1803 as the date of her death.

The evidence offered by the defendants was excluded; the jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

BIGELOW, C. J. At the trial of this case, the date of the birth of the father of the pauper, Harvey Chickering, became a material fact, because the legal settlement in controversy depended on the question whether the father was born prior to the marriage of his parents, which took place on the 22nd of February, 1804. To prove the illegitimacy of Harvey Chickering, the defendants introduced a witness who testified that she saw him, then an infant, during the lifetime of Susanna E. Blair. It then became important to establish the date of Susanna's death, because if she died before the date of the marriage of the parent's of Harvey Chickering, it would follow that he must have been born out of wedlock.

It was a case therefore where the proof of a fact material to the issue depended on the existence of another collateral fact. The *factum probandum* might well be inferred from satisfactory evidence

that an event otherwise immaterial, took place at a particular time. Such testimony is not only competent, but without it it would often be impossible to prove essential facts in a court of justice. Direct and positive proof cannot always be obtained, and in matters especially which relate to remote periods it is necessary to resort to circumstantial evidence and presumption to supply the place of that testimony which is lost by the lapse of time and the imperfection of human memory. Such evidence in the strict legal sense is not collateral. It raises, it is true, a new and distinct inquiry; but if it affords a reasonable presumption or inference as to the principal fact or matter in issue, it is relevant and material and does not tend to distract or mislead the jury from the real point in controversy.

The objection more strenuously urged to the evidence offered at the trial is to the nature and quality of the proof by which the defendants sought to establish the date of Susanna Blair's death. It is not denied that this evidence would have been competent, if it had been introduced to prove a fact directly in issue, such, for instance as the date of the pauper's birth; but it is contended that it was inadmissible to establish a fact collateral in its nature, from which the main fact in issue was to be deduced by inference. But we know of no such distinction in the rules of evidence. The competency of proof cannot be made to depend on the inference or conclusion which is sought to be drawn from it. If it is competent to prove a particular fact in controversy when it is directly in issue, it is equally competent when the same fact is to be established in order to form the ground for an inference or presumption from which the material subject of inquiry can be deduced. The true test is, to inquire whether the evidence is admissible to prove the fact which it is offered to establish, and not whether such fact is directly or only collaterally in issue.

In the present case, the defendants sought to prove the date of the death of Susanna Blair by a document or chart containing a record of the births, marriages, and deaths kept in her family for a long series of years, and handed down by her deceased parent to his sons as containing a true statement of the events therein recorded; and also by proof of the inscription on the tombstone erected to her memory in the family burial-ground. Such evidence is deemed to be competent and satisfactory proof of family descent, and also of the dates of the leading events in family history, such as births, marriages and deaths, especially when they relate to ancient occurrences. They are contemporaneous with the events which they record; they are made by parties who are cognizant of the facts, and who would have

no interest or motive in misstating them; and they are in their nature public, openly exhibited, and well known to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record.

Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened, are directly put in issue. But upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation.

We are therefore of opinion, that the rejection of the proof offered at the trial to establish the date of the death of a person who deceased more than fifty years previously was erroneous. 1 Greenl. Ev. secs. 103, 104. Berkeley Peerage Case, 4 Campb. 401. Monkton v. Attorney General, 2 Russ. & Myl. 162. Jackson v. Cooley, 8 Johns. 131.

Exceptions sustained.

CAMPION v. McCARTHY.

228 Ill. 87. (1907)

FARMER, J. This suit was begun by appellee, Henry McCarthy, filing a bill for the partition of certain lands of John Earl deceased.

The controversy is as to whether the complainant, Henry McCarthy, is an heir of John Earl, deceased, and entitled to an interest in the lands of which he died seized. Complainant claimed to be an illegitimate son of Susan Champion, who was the mother of John Earl. It is admitted that Earl was an illegitimate son of the said Susan Campion, whose maiden name was Ayres. She originally lived in Elizabeth township, near Brockville, Ontario, Canada. There she was married to Elias Champion in 1830. John Earl was born to Susan Champion (then Susan Ayres) in 1822, and after her marriage to Elias Champion he became a member of his mother's family and lived with her up to the time of her death, in 1893, usually being known by the name of John Champion. In 1849 Elias and Susan

Champion, and several children born to them after their marriage, and John Earl, moved to DuPage County, Illinois, where they resided about one year and then moved to Ogle county, where they lived until the parents died. Susan Champion died in 1893, leaving a will, in and by which she devised to John Earl the real estate in controversy. Complainant claimed to be an illegitimate son of said Susan Champion, born to her in Canada in 1826, before her marriage to Elias Champion. This would make him a half brother to John Earl, and, as such, an heir entitled to a one-fourth interest in the real estate of which John Earl died seized.

It is not denied that hearsay evidence, such as declarations of deceased parents and members of the family, may be proven to establish pedigree, but it is contended that the rule permitting such proof is limited to cases of legitimate relationship and cannot be heard to establish illegitimacy. While this position is apparently sustained in Flora v. Anderson, 75 Fed. Rep. 217, cited and relied on by appellants, that case is not in harmony with the great weight of authority as well as the better reason. That case followed the English case of Crispin v. Doglioni, 3 Swab. & Tr. 44, which appears to have been based upon the common law rule that an illegitimate is *filius nullius*. This common law rule has been abrogated in this and other States by statute (Miller v. Pennington, 218 Ill. 220; Bales v. Elder, 118 id. 436); and where such statutes have been enacted. Crispin v. Doglioni cannot be regarded as authority to be followed. The declarations sought to be proved in that case were those of a deceased brother of the intestate putative father, and the court held that the putative father had no relationship with a bastard son, and his declarations, or those of members of his family, were therefore incompetent.

As to whether declarations of the supposed father and members of his family are competent there is some conflict in the authorities. In Elliot on Evidence (vol. 1, sec. 376), it is said: "There is a conflict as to whether the declarations as to a son's illegitimacy, by a member of the father's family should be rejected. The better rule, is, not to exclude such testimony in a proper case. There seems to be no dissent whatever, however, as to the admission of the declarations in a proper case, as to illegitimacy, made by a member of the mother's family. There is, perhaps, a technical reason for excluding the declarations as to illegitimacy where they show that the person is a bastard, and not, therefore, a member of the father's family; but this would hardly apply in the case of the mother, and in most of the

States there are statutes which change the common law status of bastards."

The rule that declarations of the supposed parent and deceased members of his or her family may be proven to establish the parentage where the relationship is illegitimate, is supported in Crawford v. Blackburn, 17 Md. 49 (77 Am. Dec. 323), Blackburn v. Crawford, 3 Wall. 175, Watson v. Richardson, 110 Iowa, 678, and Alston v. Alston, 114 id. 29. In all of these cases it is held that the declarations of the putative father may be proven. Unquestionably, by the great weight of authority the declarations of the mother and the members of her family are competent to prove the relation of parent and child without regard to whether the claim is that the child was legitimate or illegitimate. It is, of course, to be understood that this rule is applicable only in cases where the child was born before marriage of the mother. or in cases where she had never been married.

Decree affirmed.

WISE v. WYNN.

59 Miss. 588. (1882)

CHALMERS, J. More than forty years ago there came to Holmes county in this state a man calling himself Charles Wise. His parentage and past antecedents were wholly unknown, and except to a few persons he seems to have preserved great reticence on these subjects. He lived in Holmes county continuously thereafter, until his death in 1870, and in the meantime accumulated a considerable landed estate. Dying intestate, unmarried, and without known heirs, his property after his death was by regular proceedings escheated to the State, and from the State subsequently purchased by the appellee, Wynn. Within the time limited by our statutes (Code 1880, sec. 892, this action has been brought for the recovery of the property by those who claim to be the heirs-at-law of the decedent.

They prove that they are the children of Thomas Wise, deceased, formerly a resident of a place known as "Hell's Corner," In Amelia County, Virginia, where the corners of three counties come together; that nearly fifty years ago their father had a younger brother named Charles, who having seduced a young lady of respectable family, fled the country to escape the vengeance of her relatives, and announced

at the time, to an intimate friend, that he expected to go to Texas or Mississippi, and that he should take care that no one in Virginia should ever discover the place of his future home. The friend to whom this statement was made is still alive, and these facts are established by his testimony. From that time forth, until within a short time before the bringing of this suit, nothing was ever heard in Virginia of the subsequent career of Charles Wise. Having made this proof, the plaintiffs proposed to prove by two witnesses, living in Holmes county, that the man known as Charles Wise, and whose estate is involved in this litigation, told them that he came from a place in Virginia known as "Hell's Corner," where the corners of three counties came together, that he had there a brother named Thomas, and that he had left there because of some trouble about a woman. The whole of this proffered testimony was excluded by the court below, except the isolated statement of the deceased that he had a brother named Thomas, the witnesses not even being allowed to state that the deceased had said that his brother Thomas lived in Virginia, or that he himself came from that State.

This ruling of the learned judge was based upon the dicta of many authorities to the effect, that while in questions of pedigree the hearsay declarations of a deceased member of a family are receivable in evidence, as to matters of birth, death, age, marriage, and the like, declarations as to place are not. The later and better considered cases, however, repudiate this distinction between declarations as to place and those touching other family matters, where the inquiry is strictly one of pedigree, and the declarations as to place are not relied on as giving any right by reason of the place, but proof as to place is made merely by way of identification of the person or family. Thus, in a question of settlement under the poor laws, where the right of settlement is dependent upon the place of present or former residence, hearsay declarations as to place are inadmissible; but where the question is purely one of pedigree, and the effort is to identify the particular person or family about whom the declarant was speaking, declarations as to place stand upon the same footing as any others relative to matters of family history. Wharton Ev. sec. 208, and cases cited. Manifestly this is the true rule here. There can be no reason founded in good sense for admitting the declarations of a deceased person that he has a brother named Thomas, and excluding his statement of where that brother lives. The name wholly fails to identify without identification of the place, and the one is worthless without the other. If the court below was correct in admitting any

of the declarations of Charles Wise touching his family, it should have admitted them all, since they all tended to establish his own identity, and were proffered not for the purpose of basing any particular right on the place of his alleged nativity, but solely for the purpose of showing who he was, and to what family he belonged.

But was it admissible to show this by his own statements, without some proof outside of his own declarations connecting him with the family of which he claimed to be a member? The general rule undoubtedly is, that before hearsay declarations in matters of pedigree can be introduced in evidence, some proof *dehors* the declarations must be made that the declarant was in fact a member of the family about which he was speaking. It was unanimously so ruled by all the judges in The Banbury Perrage Case, 2 Selwyn N. P. 764, where the petitioner sought to introduce in evidence the statements and depositions contained in a chancery litigation conducted more than one hundred and fifty years before, in which an ancestor of the petitioner styled himself, and was styled by those who professed to belong to the family, the legitimate son of A. B. It was held that such statements were not admissible, though upon a question of pedigree, until it could be shown by proof *aliunde* that those making these statements actually were members of the family as to which the claim was preferred. The same doctrine is announced in Monkton v. Attorney General, 2 Russ. & Myl. 147, though it may perhaps be doubted whether the conclusion reached in that case does not offend against the doctrine. But in these and many other cases of a similar character, which might be cited, the attempt was to set up some right derived through the declarant, and to establish that right by his own statements as to the pedigree of the family of which he claimed to be a member. It seems manifest that this cannot be done without precedent proof from other sources that he is what he claims to be, to wit, a member of the family. Thus, if Charles Wise had married here and left children, it is clear that those children could not have claimed any interest in the estate of Thomas Wise, in Virginia, by virtue alone of their father's statement that Thomas was his brother. But how is it when the case is reversed, and a plaintiff is seeking to reach the estate of the declarant by evidence of what he said with reference to his family and kindred? It is quite clear that I cannot establish my right to share in the estate of A. by proof alone of the fact that my father declared in his lifetime that A. was his brother, but may I not do so by showing that A. himself so declared? Upon this question we find a singular dearth of authorities. In Adie v.

Commonwealth, 25 Gratt. 712, a case strikingly like this in all its features, testimony of this character seems to have been admitted without objection, and so also in Cuddy v. Brown, 78 Ill. 415. In Moffit v. Witherspoon, 10 Ired. 185 persons who claimed to be the nephews and nieces of Mrs. Donahoe, in an ejectment suit brought after her death to recover certain real estate belonging to her during her life, were permitted to prove that she had declared, many years before her death, that the mother of the plaintiff's was her only sister, and no other proof of heirship than this seems to have been offered. In Shields v. Boucher, 1 De G. & Sm. 40 (a case to which we have not had access, but which is referred to at length in Whart. Ev. sec. 208, note 4), Sir Knight Bruce expressed the strong conviction that in a controversy purely genealogical declarations made by a deceased person, as to where he or his family came from, of what place his father was designated, and what occupation he followed would be admissible, and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion.

Independently of these or of any authorities, we think *ex necessitate rei* as a matter of common sense, that declarations such as were offered here and under the circumstances here existing, should always be received in evidence. They stand to some extent upon the footing of declarations against interest, or of what Mr. Wharton calls "self-disserving declarations." If they be not admitted, there must be in many cases a failure of justice. No man who knew Charles Wise in Virginia ever saw him here, and no man who knew him here ever saw him in Virginia; and if we reject his own statements as to who he was, and whence he came, these inquiries must remain forever unanswered. If such be the rule of law, it must be impossible legally to establish the identity of very many travellers who die among strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they were.

Reversed and remanded.

MASONS v. FULLER.

45 Vt. 29. (1872)

This was a complaint for bastardy, made by the said Vergina by the name of Vergina Vine, dated in January, 1871, wherein she represented herself as a single woman. The case was entered in the May term, 1871 and continued to the December term following, at which term it was tried by jury upon the general issue. Redfield, J., presiding.

Before the trial, John Mason, by leave of court, entered as a party plaintiff, as the husband of said Vergina. The said Vergina testified on cross-examination as follows:

"I was married to my first husband, Edward Vine, some fourteen years ago, and lived with him nine years in Bakersfield. He then went off, and I have not seen him since. He said he was going to St. Albans, when he left. My husband died two years ago last March. I was not with him at the time of his death, or present at his burial, and have no personal knowledge of his death; I only know it from his folks telling me and writing me. They wrote me three letters this winter, and his brother told my husband."

The defendant requested the court to charge that the said Vergina having testified to a former marriage, it was necessary, in order to entitle her to a verdict, that she would show by legal proof, the death of her said husband, Edward Vine; that her testimony did not amount to legal proof, upon which the jury could find the fact of death.

But the court upon this point charged as follows:

"The question is made, whether the said Vergina, at the time of conception and birth of the child, was a single woman. The only testimony upon this point, is from her, and you have to say whether this fact is, in your minds, established. When a woman comes into court for trial, the law will not presume any marriage—she will be presumed to be single, in the absence of any evidence tending to prove a marriage."

To the refusal to charge as requested, and to charge as given the defendant excepted.

WHEELER, J. So far as the defendant asked the court to charge that the plaintiff must show the death of her former husband, to entitle her to a verdict in her favor, the request appears to have been complied with. That part of the charge stated, in which the court told the jury that the law would not presume any marriage, but would

presume a woman to be single, appears to have been stated with reference to a case where there was no evidence upon the subject of marriage one way or the other. Such a case would have been very different from this one; and the remark appears to have been made as an illustration merely, and not as a guide to the jury. Whether sound or erroneous, the remark would not injure the defendant. The only question left, as to this part of the case, is whether the testimony of the plaintiff as to what her former husband's folks had told and written her about his death, was competent evidence of it. "Hearsay is good evidence to prove who is my grandfather, when he married, what children he had, &c.; of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relation beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence." Buller's N. P. 294. Similar doctrine has been many times approved of and applied in England, and in the federal and state courts in this country. 1 Phillips' Ev. 269, Cowen & Hill's note, 97; Webb v. Richardson, 42 Vt. 465. This would seem to sustain the ruling of the County Court in this respect.

Judgment affirmed.

SCHEIDEGGER et al. v. TERRELL.

149 Ala. 338. (1906)

Ejectment by Rudolph Scheidegger and others against Joshua D. Terrell. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

This is an action of ejectment (under the statute) for the recovery of certain real estate, the plaintiffs claiming as the heirs of one Madeline Kronenberg, wife of Edward Kronenberg. The point of contention is whether or not said Madeline Kronenberg, wife of Edward Kronenberg is identified as the same person as Madeline Ritter, who left Switzerland years ago and came to the United States. The court below excluded certain parts of certain depositions, a nonsuit was taken, and this appeal thereon.

The contention of the appellant is that those parts of the depositions which were suppressed should have been admitted, under the rules of law, which permit hearsay testimony to a certain extent in matters of pedigree. The principles of law are few and well under-

stood on this question, to-wit: That, in matters of pedigree, the general repute in the family may be testified to by a member of the family; also that declarations by the deceased himself, and declarations by persons who are shown by other evidence to be members of the family, may be proven, provided such members are dead. Such declarations by members of the family must be general repute in the family, or on what said members have heard other members of the family say. A declaration which merely expresses information collected from persons not qualified to be declarants, or from other sources than family tradition, or the statements of other members of the family who knew the facts, is not admissible. It is also true that, where a declaration of a member of the family is sought to be proved, the declaration itself should be proved, and not the declaration of the witness from it. 1 Elliott on Ev. secs. 336, 371; Stein v. Bowman, 13 Pet. (U. S.) 209, 10 L. Ed. 129; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Jackson v. Browner, 18 Johns. (N. Y.) 37; Wise v. Wynn, 59 Miss. 588; 42 Am. Rep. 381; Young v. State (Ore.) 59 Pac. 812, 47 L. R. A. 548; 16 Cyc. 1130, 1228, 1229; 22 Ency. Law, pp. 641, 642, 650; In re Hurlburt's Estate, 68 Vt. 366, 35 At. 77, 35 L. R. A. 794, 800; Rogers v. De Bardeleben Coal & Iron Co., 97 Ala. 154, 156, 12 So. 81.

The testimony of Frederick Scheidegger shows that he had no personal knowledge at all of Magdalen Ritter, or of Madeline Kronenberg. While he states that his mother used to "speak of her to us children," yet when he came to relate what his mother actually said, it was simply that "her sister was in the United States and that she "used to receive letters from her." There is no fact in his testimony, no repute in the family and no declaration of any member of the family, which tends to show that Magdalena Ritter and Madeline Kronenberg were one and the same person. He states distinctly that his knowledge of the fact that Madeline Kronenberg's maiden name was Ritter and that she married Kronenberg, was from the documents from Mobile in the English language, which has been translated to him. Hence these parts of his testimony noted as "stricken" being evidently derived from these sources, were properly suppressed.

The point of the third ground of objection to the testimony is not that the person making the declarations, to-wit, the mother of the witness, is not shown to be a member of the family of Madeline Kronenberg, for, of course, that is the thing to be proved by the statements, and it would be only necessary to show that the declarant was a member of the family to which it is sought to attach Madeline Kron-

enberg by her statements; but the point is that the "hearsay statements" do not consist of "declarations" of such a person having a knowledge of the facts. If the witness had testified that he had often heard his mother say that she had a sister living in Mobile, Ala., whose name was Madeline Kronenberg, and that her husband was named Edward Kronenberg, and that they called her Madeline, in English in place of Magdalena, as she was originally called, then that would have been properly admitted as a statement of a member of the family; but, as before shown, the witness does not testify to any such statements, but only to his own inferences that Madeline Kronenberg was "born Ritter," etc., because his mother said that she had a sister in the United States and he had seen certain translations of English documents from Mobile.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

GREENE v. ALMAND.

111 Ga. 735. (1900)

COBB, J. "Pedigree, including descent, relationship, birth, marriage, and death, may be proved by the declarations of deceased persons related by blood or marriage." Civil Code, sec. 5177; Foster v. Brooks, 6 Ga. 293. "Before such declarations, however, can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations; for it would be a *petitio principii* to say that his declarations are receivable because he is a member of the family, and he is a member of the family because his declarations are receivable." 1 Wharton, Ev. sec. 218. "The *relationship of the declarant* with the family *must be established* by some proof *other than the declaration* itself." 2 Taylor, Ev. sec. 640. See also American Notes to same volume, page 427; 1 Gr. Ev. (16th ed.) 198; 18 Am. & Eng. Enc. L. (1st ed.) 260; Abbott's Trial Ev. (2nd ed.) 117, sec. 36; Blackburn v. Crawfords, 70 U. S. 175. The only assignment of error in the bill of exceptions which was argued here complained of the rejection of evidence which was, under the principles above referred to, clearly inadmissible; and therefore the judgment is

Affirmed. All the Justices concurring.

ROLLINS v. WICKER.

154 N. C. 559. (1911)

WALKER, J. This is an action for the recovery of land. Plaintiff claimed that she inherited the land from her father, Thomas Rollins, and the sole question in the case is as to her legitimacy. Her father and mother were married at the time of his death. The evidence as to the time of the plaintiff's birth was conflicting. The jury found that Thomas Rollins owned the land at the time of his death; that plaintiff is not his heir at law, and, therefore, is not the owner of the land. There was a finding as to defendant's title, but that is not material, as plaintiff must recover on the strength of her own title, and cannot rely on the weakness of defendant's.

In order to show that plaintiff was the legitimate child of Thomas and Rachel Rollins, the plaintiff proposed to prove by a witness named Kelly that he was a juror in the trial of a case formerly pending in Moore county, wherein the plaintiff in this case, but not the defendant, was a party, and which involved the legitimacy of the plaintiff, and that the jury found as a fact that the plaintiff was the legitimate child of Thomas and Rachel Rollins. An objection to this evidence was sustained, and the plaintiff excepted. The ruling was correct. That was not the way to prove the fact, even if the evidence were otherwise competent. The record itself is the primary and only competent proof of its contents, unless it has been lost or destroyed, and there is no suggestion that it had been. Secondary evidence is admissible when the original cannot be produced. Varner v. Johnson, 112 N. C. 570; In re Thorp, 150 N. C. 487. "It may be stated generally that the record, or, in proper cases, certified or duly exemplified and authenticated copies thereof, should be produced to show transactions in judicial proceedings, and, when a matter is of record, parol evidence is not, ordinarily, admissible to show the contents of the record." 1 Elliott on Evidence, sec. 212.

The plaintiff offered to prove by the same witness what was the testimony of Joseph Buchanan (a deceased kinsman of the plaintiff) in the trial of the other case as to plaintiff's legitimacy, and that it tended to establish the fact. This evidence was properly excluded. It does not appear that the declaration of the deceased relative was made *ante litem motam*. This expression is not restricted to the date of the commencement of the present suit, but to the beginning of the controversy. In order to avoid the mischief which would otherwise

result, "all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected. This rule of evidence was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to an earlier period of the controversy. But in our law the term *lis* is taken in the classical and larger sense of *controversy,* and by *lis mota* is understood the commencement of the controversy. The commencement of the controversy has been further defined by Mr. Baron Anderson, in a case of pedigree, to be 'the arising of that state of facts on which the claim is founded, without anything more.'" 1 Greenleaf on Evidence, sec. 131. The value of this kind of evidence depends upon its being drawn from an unbiased source, and it should emanate from those in a situation favorable to a knowledge of the truth, and, what is a very important consideration, it should refer to a period "when this fountain of evidence was not rendered turbid by agitation." Section 132. In the same section a very apt illustration, applicable to this case, will be found, for it is there said: "In this case (Freeman v. Phillips, 4 M. & S., at page 497), it was obsefved by one of the learned judges that 'the distinction had been correctly taken that, where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who, embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources'". 2 Wigmore on Ev. secs. 1482-3; Westfeldt v. Adams, 131 N. C. 379. In our case it appears that a controversy existed, as to the plaintiff's legitimacy, at the time of the alleged declaration, when it is supposed that the mind of the declarant was not evenly or nicely poised, but may have been leaning toward one side, with the temptation to exceed or fall short of the truth. The proposed testimony should be free from suspicion. 2 Wigmore, sec. 1482 and notes.

The assigments of error cannot be sustained.

No error.

PEOPLE v. RATZ.

115 Cal. 132. (1896)

HENSHAW, J. The defendant was convicted of the crime of rape, in having had carnal intercourse with a female child under the age of fourteen years, and not his wife. The intercourse was admitted. The age of the child was a question in dispute. It was conceded that the intercourse was not had through force or violence, so that if, at the time thereof, the child was over the age of fourteen years, the crime of rape was not committed.

The child herself testified to her age, as well as to the date of the intercourse. Her evidence went to show that, at the time when Ratz carnally knew her, she was under the age of fourteen. The evidence of the child was admissible. A person's age may be proved by his own testimony, and the fact that knowledge of that age is derived from the statements of the parents, or from family reputation, does not render it inadmissible. (Hill v. Eldridge, 126 Mass. 234; Cherry v. State, 68 Ala. 29; Bain v. State, 61 Ala. 75; Roscoe's Criminal Evidence, 272.) The testimony of the mother of the child also went to prove the fact that, at the date in question, she was under the age of fourteen.

The mother, when on the witness stand, was shown a book, and testified that it was hers, and that it was her family Bible; that it contained the record of her family. This book contained, amongst other entries, the name of the child and the date of her birth. The mother testified that it was correct. Objection was made to the introduction of the record, by the defendant, upon the ground that it appeared that the record was in English; that the mother did not know how to read or write English, and could not tell whether or not the record was correct.

The admissibility of the book did not depend upon proof of handwriting or authorship of the entries. It depended upon proof of the fact that it was the family Bible, which evidence was offered by the testimony of the mother. As is well said in Hubbard v. Lees, L. R. 1 Ex. 255: "To require evidence of the handwriting or authorship of the entries (in a family Bible) is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that

place, they are to be taken as assented to by those in whose custody the book has been."

Judgment and order appealed from are affirmed.

McFARLAND, J., and TEMPLE, J., concurred.

RINGHOUSE v. KEEVER.

49 Ill. 470. (1869)

LAWRENCE, J. This was an action in ejectment brought by Maria Keever, claiming as widow and heir of her former husband, Henry Hardie. It is objected that the proof of the death was not sufficient. The ordinary rule is that it is general reputation among the kindred only of a deceased person that is admissible in proof of death, but that rule has been sometimes relaxed, as in Scott's lessee v. Ratliffe, 5 Pet. 81. Where, as in the present case, the deceased left no kindred that are known, the rule must be relaxed from necessity.

In this case, the depositions of two witnesses were taken, who lived in New Orleans, and who were present at the marriage of Hardie in that city, in 1845. They testify that he had but one child, who died, and that he, also died of cholera in 1849. His death was announced in the newspapers, and he was spoken of by his acquaintances as dead. His widow subsequently married her present husband.

The instruction given for the plaintiff is not sufficiently qualified as a rule of universal application, but in this case it worked no prejudice, as the evidence was competent and sufficient. In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice.

Judgment reversed.

WALL v. LUBBOCK.

52 Tex. Civ. App. 408. (1908)

KEY, J. This is an action of trespass to try title. F. R. Lubbock and others being plaintiffs and Q. A. Wall and his wife being defendants in the court below. The land involved is a part of the John S. Chiveral headright survey of 1280 acres, located in Sabine county.

The answer filed by the defendants embraced a general denial and plea of not guilty and limitation of three, five and ten years.

The land was patented to John S. Chiveral in 1845 and the plaintiffs proved the death of John S. Chiveral and that they were his heirs.

The defendants claimed the land under a chain of title alleged to extend back to John S. Chiveral. The first deed in their chain of title is dated June 7, 1846, and is executed by W. B. Frazier, purporting to act as the agent and attorney for John S. Chiveral. The deed referred to was not produced, but evidence was submitted tending to prove its existence, loss and contents, and the jury, in responding to special issues submitted to them, found that such deed was executed. The plaintiffs introduced testimony tending to show the death of John S. Chiveral prior to the execution of the deed referred to by W. B. Frazier, as agent of Chiveral, and the jury found as a fact that John S. Chiveral was dead at the time Frazier executed that deed.

The first assignment of error challenges the correctness of the trial court's ruling in permitting the plaintiff, F. R. Lubbock, to testify concerning the death, and the time thereof, of J. S. Chiveral, and the relationship of the plaintiffs to him, the contention being that the testimony referred to was hearsay and not admissible. The witness testified that his wife was a daughter of G. H. Chiveral, and that C. H. Chiveral was the son of John S. Chiveral. He also testified that John S. Chiveral died in 1836, leaving two surviving children; only one of whom is now alive. On cross-examination the witness stated that at the time of testifying he was 56 years old, and that he did not know John S. Chiveral. Being asked how he knew that G. H. Chiveral was related to John S. Chiveral, he answered: "I know that John S. Chiveral was the father of G. H. Chiveral from family history." In response to another cross-interrogator, he said: "When I answered direct interrogatory No. ten by saying that Jane and G. H. Chiveral were the only heirs of John S. Chiveral, I spoke from what I had been told by the family. I was told by the family.

I was told by the family that they were the children of John S. Chiveral of Sabine County Texas." It was also shown that the witness first formed the acquaintance of G. H. Chiveral in 1864 or 1865, and afterwards married his daughter Elizabeth, who is one of the plaintiffs in this suit.

It is well settled that matters of pedigree may be proved by hearsay testimony, such as family history; and it has also been held that other facts not entirely matters of pedigree, may be so intimately connected with pedigree as to permit of their proof by the same character of testimony. (Byers v. Wallace, 87 Texas, 511.) The witness was a member of the Chiveral family, and we think it was competent for him to give testimony as to the family history, including the death and time of death of John S. Chiveral, although he did not state that he obtained his information from members of the family now deceased. (Elliott on Evidence, secs. 360, 366, 371, 378; Wharton on Ev. sec. 201; Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. ed. 108; Fulkerson v. Holmes, 117 U. S. 389, 29 L. ed. 915.)

John A. Morris, a witness for the plaintiffs, testified that he first became acquainted with the family of John S. Chiveral about 1842 or 1843; that the family consisted of Mrs. Chiveral and a son and daughter, that it was generally understood at the time in that community that John S. Chiveral was dead, and that Mrs. Chiveral was recognized as a widow. This testimony was complained of as hearsay and the objection overruled. While the testimony objected to was hearsay, it seems to come within one of the exceptions to the rule which excludes hearsay testimony, and we therefore overrule the second assignment which complains of the ruling admitting that testimony. (1 Wharton on Evidence, sec. 223; Lessee of Scott v. Ratcliffe, 5 Peters, 81, 8 L. ed. 56; Primm v. Stewart, 7 Texas, 182.)

Affirmed.

YOUNG v. SHULENBERG.

165 N. Y. 385. (1901)

VANN, J. The complaint charges the defendant with unlawfully entering upon the lands of the plaintiff and cutting down and carrying away a large number of trees therefrom. Neither by his answer nor evidence did the defendant claim the right to enter upon the land in

question or to cut trees thereon, but he put at issue the entry by himself, as well as the title of the plaintiff. The land upon which the tresspass was committed was virgin forest in the county of Fulton that had never been so inclosed, cultivated or used as to constitute an adverse possession. (Code Civ. Pro. sec. 370.) The plaintiff proved a record title thereto, commencing in 1794, when letters patent were granted by the state of New York, and extending through various mesne conveyances until 1872 when the apparent title vested in William Claflin, of whom in September, 1893, the plaintiff purchased by a contract which imposed upon him the duty of paying the annual taxes and gave him the privilege of cutting and carrying away timber upon certain conditions. He cut 8,000 or 10,000 logs every year on the tract and had such possession only as may be implied from the foregoing facts. (Machin v. Geortner, 14 Wend, 239; Hunter v. Starin, 26 Hun, 529.)

The attack made upon the title by the defendant is that there is no legal evidence to show that Anne Ellice and six others, all residents of England, who in July, 1817, conveyed 200,000 acres, including the *locus in quo,* in consideration of £20,000, were the widow and heirs at law of Alexander Ellice, also a resident of England, who took title from the patentee in 1795. It appeared, however, that the six deeds constituting the chain of title from the state, had all been recorded, and that they were all in the possession of Mr. Claflin, the last grantee, who kept them together as muniments of his title. It further appeared that the deed of 1817, which was acknowledged in London before the minister of the United States to Great Britain, recited that Alexander Ellice, of London, died intestate and seized of the said premises, leaving the grantors as his widow and heirs at law.

Whether Anne Ellice was the widow and her co-grantors the heirs at law of Alexander Ellice was a question of pedigree, which owing to the difficulty of producing living witnesses to prove remote events, is an exception to the rule excluding hearsay evidence. Pedigree is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence it cannot, in most instances, be proved at all. Hence, declarations of deceased members of a family, made *ante litem motam,* are received to prove family relationship, including marriages, births and deaths, and the facts necessarily resulting from those events. (Eisenlord v. Clum, 126 N. Y. 552; Jackson v. Cooley, 8 Johns. 128; Jackson v. King, 5 Cow. 237; Jackson v. Russell, 4 Wend. 277; Greenleaf's Ev. (14th ed.) secs. 103-4; Wharton's

Evidence (3rd ed.) secs. 201 *et seq.;* Rice on Ev. sec. 220.) Recitals in an ancient deed, admissible in evidence without proof of contemporaneous possession, may be proved as against persons who are not parties to it and who do not claim under it. (Greenleaf v. B. F. & C. I. R. R. Co., 132 N. Y. 408; Fulkerson v. Holmes, 117 U. S. 389; Deery v. Cray, 72 U. S. 795; Doe v. Davies, 10 A. & E. (N. R.) 314; 18 Am. & Eng. Encyc. 263, 266.)

Before the declarations can be received, however, as evidence of pedigree, it must appear that the person making them was a member of the family and that he is dead, incompetent, or beyond the jurisdiction of the court. Therefore, before the declarations of Anne Ellice, as contained in the recital of her deed, could be received in evidence on the question of pedigree, it was necessary for the plaintiff to show that she was a member of the family of Alexander Ellice, and that she could not be produced or testify owing to one of the contingencies named. While the law required that her relationship to the Ellice family should be shown by evidence independent of her own declarations, still, as was recently held in an important case, "but slight proof of the relationship will be required, since the relationship of the declarant to the family might be as difficult to prove as the very fact in controversy." (Fulkerson v. Holmes, 117 U. S. 389, 397.)

The proof of such relationship rested upon the identity of the family name, the certificate of acknowledgment before the United States minister, and the custody by the proper party of the deeds showing the title in Alexander Ellice by conveyances running back to and including the original patent.

We think the plaintiff, established a right to recover by evidence which was competent under the circumstances of the case, and, after examining all the exceptions, we affirm the judgment appealed from with costs.

PARKER, C. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

LOUISVILLE & N. R. R. CO. v. KICE.

109 Ky. 786. (1901)

BURNHAM, J. The appellee instituted this action against appellant to recover the value of a thoroughbred race horse alleged to have been negligently killed by one of appellant's trains. Appellant in its answer admitted the killing of the horse by its train, but denied that it was guilty of any negligence, and alleged that the killing of appellee's horse was unavoidable so far as it was concerned. Several months after the institution of this suit appellee filed an amended petition, in which he alleges that the place where the horse was killed was on the track of the defendant's road adjoining lands belonging to, and occupied by, plaintiff; that he had not received compensation for fencing his land along the road at that point; and asked that, if he was not allowed the full value of the horse, he have judgment for one-half of such amount. To the filing of this amended petition appellant objected on the ground that a distinct and separate cause of action was set up. Appellant's objections were overruled, and the amended petition permitted to be filed.

Another ground of complaint is that the trial court permitted witnesses for appellee to testify as to the pedigree of the horse killed, as shown by the American stud books. Undoubtedly the pedigree of a race horse constitutes an important element in determining its value. as it is a matter of common knowledge that a much larger proportion of thoroughbred horses are successful racers than horses not so bred. It appears from the testimony that the stud books in question are records carefully compiled by experts under the supervision of the breeders of this class of horses, and that they have been so kept for many years, and are universally accepted as conclusive evidence upon this point by persons dealing in such animals. Section 1325 of the Ken. Statutes provides severe penalties for furnishing false pedigrees of stock, and we are of the opinion that the court did not err in permitting the witnesses to testify as to the pedigree of the animal killed as shown by these records.

Judgment affirmed.

SITLER v. GEHR.

105 Penn. St. 577. (1884)

Ejectment, brought May 22, 1882, by Baltzer Gehr against David Sitler (tenant) Samuel H. Rothermel et al., heirs of Maria Rothermel, deceased, and George F. Miller and Amanda, his wife, in her right, et al., devisees of Hannah Nicely, deceased; to recover an undivided one-third part of a messuage and tract of land, containing 231 acres, situate in Maxatawny township, Berks county. Plea, not guilty.

Plaintiff called as a witness Solomon Gehr, a nephew of plaintiff, who had married a daughter of John Gehr, deceased, who also was a nephew of the plaintiff, and proposed to prove by the witness the declarations by the said John Gehr, in his lifetime as to the relationship of Baltzer Gehr, the plaintiff and Balser Gehr of Berks county.

Offer objected to as hearsay evidence; that while hearsay testimony is allowable to prove pedigree and relationship, it is only such hearsay as is within the rules of evidence governing its admission, which the present offer is not; that before such declarations can be admitted, it must be proved by evidence *aliunde* to the satisfaction of the court that John Gehr was a member of this family of Balser Gehr of Berks county.

PAXSON, J. The first five assignments of error may be considered together. They raise the question of the admissibility of the declarations of Anna Maria Gehr and John Gehr upon a question of pedigree. The purpose of offering said declarations was to establish relationship between the plaintiff and Balser Gehr, of Berks county. The evidence was objected to because it was not shown *aliunde* that the declarants were of the family of the Berks county Balser Gehr. The evidence was admitted and bill sealed for the defendants.

The rules of evidence applicable to pedigree cases are: 1. That the statements must be made *ante litem motam.* 2. Declarant must be dead. And 3. But a prior condition to both these is, that it should be proved by some source of evidence independent of the statement itself, that the person making the statement is related to the family about which he speaks: Smith v. Tebbitt, L. R. 1 P. & D., 354.

It was not denied that the first two conditions had been fulfilled. Neither was it questioned that the declarants were shown by evidence *dehors* the declaration to be related to the family of Joseph Gehr, the ancestor of the plaintiff, but it was contended that the declarants

must be shown by evidence *aliunde* to be related to Balser Geehr, of Berks county; in other words, to the person last seised of the estate, or his particular branch of the family. To state the question in another form: the declarants were Anna Maria Gehr and John Gehr; the plaintiffs' ancestor was Joseph Gehr; the deceased ancestor was Balser Gehr, of Berks county. It was not denied that the declarants were of the family of Joseph Gehr, and it was attempted to show by their declarations that the above named Joseph Gehr and Balser Geehr were related to each. The question was, whether sufficient ground had been laid for such declarations.

The plaintiffs in error contend, not only that the declarants must be shown by evidence *aliunde* to be related to the family as to which the declarations were made, but also that they must also be thus shown to be related to the person who died seised. The first part of this proposition is undoubtedly true under all the authorities; the latter portion of it is not so clear. I have carefully examined all the authorities cited on both sides upon this point, and any others to which our attention was not called upon the argument, and although there is some conflict in the cases the weight of authority seems to be that while a declarant must be shown by evidence *aliunde* to belong to the family, it does not appear to be necessary to show that he belongs to the same branch of it. In Vowles v. Young, 13 Vesey, 147, it was held that the declarations of a deceased husband concerning the descent or pedigree of his wife are admissible. And in Jewell v. Jewell, 1 Howard, 219, that the declarations of a deceased husband of one of the plaintiffs claiming as heir of her father, that his wife was not married to her father, were admitted.

It would seem, however, that the declarations of a husband in regard to his wife's family or of a wife in regard to her husband's rest substantially upon the same principles as those of a relation by blood and these cases do not throw much light upon the question we are considering.

Blackburn v. Crawfords, 3 Wall. 185, also cited by plaintiffs in error, does not sustain their contention. In this case the question was, whether Dr. Crawford had been married to Elizabeth Taylor. The plaintiffs claimed to be his nieces and nephew. To prove this relationship they offered the declaration of one Sarah Evans, who was a sister of Elizabeth Taylor. The evidence was held incompetent because she did not belong to the family. The question was, who were Dr. Crawford's heirs. It was said by Mr. Justice Swayne, in delivering the opinion of the court: "If it had been proved by independent

testimony that Sarah Evans was related by blood to any branch of the family of David Crawford, and her declaration had been offered to prove the relationship of another person claiming or claimed to belong also to that family, this case, Monkton v. Attorney-General, 2 Russ. & M. 157, would have been in point. But this declaration of Sarah Evans offered to prove that her sister was connected by marriage with a member of that family, was neither within the principle nor the language of that authority."

The whole question is thus summed up by Mr. Wharton in his work on Evidence, page 216: "Declarations as to a family in order to be received must emanate from deceased persons connected with such family by blood or marriage." The same rule is laid down in most of the approved text books. See Phillips on Ev. sec. 275; Taylor on Ev. 576. The last case to which I shall refer is that of Monkton v. Attorney-General, 2 Rus. & M. 157, where it was said by Lord Brougham: "I entirely agree that in order to admit hearsay evidence in pedigree, you must by evidence *dehors* the declarations connect the person making them with the family. But I cannot go the length of holding that you must prove him to be connected with both branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient; and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence but declarations of the nature of pedigree; that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only when the parties died, or whether they are actually dead; everything in short, which is strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family by the declarations of deceased persons, who by evidence *dehors* those declarations, have been previously connected with the family respecting which their declarations are tendered."

The learned Judge below was satisfied and received the evidence. We cannot say he was wrong. The plaintiff was a competent witness, made so by law, and his testimony, as to his relationship with Balser Gehr, of Berks county, was properly received. It is true his information was derived from his mother, and was to that extent hearsay. But a large proportion of the knowledge which every intelligent man has is derived from hearsay. Indeed we scarcely realize how little we actually know from our own observation and investigation. We learn the truths of history, the secrets of science and our

knowledge of the world generally, from what we have read, or from what others have told us. What does a man know of his deceased ancestors but what he has learned from his immediate relatives? How was the plaintiff who had never seen Balser Gehr of Berks county, to know that the latter was his uncle except from his mother? It is in just such cases that the strict rules of evidence are relaxed as regards hearsay. If it were otherwise pedigree could not be proved at all in many cases, and in one sense it is primary not secondary evidence. The law upon this point is clearly stated in 1 Wharton's Ev. sec. 201: "Pedigree from the nature of things, is open to proof by hearsay in respect to all family incidents, as to which no living witness can be found. If what has been handed down in families cannot be in this way proved, pedigree could not, in most cases, be proved at all. Nor is such tradition, in its best sense, open to the objections applicable to hearsay.

We cannot say, therefore, that the plaintiff was an incompetent witness to prove his relationship to the Balser Gehr, of Berks county, nor that his testimony was incompetent from the fact that his knowledge upon that subject was derived from his deceased mother. She always told him that Balser Gehr was his uncle; it was a part of their family history; one of their family traditions, furnished by one who had the means of knowledge and no possible motive to falsify, so far as appears in the case.

Judgment affirmed.

VANTINE v. BUTLER.

240 Mo. 521. (1911)

WOODSON, J. This cause is in this court by appeal on the part of the defendants, Mary Butler, Louititia Phelan and Mary Butler, the younger, and Vincent D. Phelan, executors of the last will and testament of John Butler, deceased, defendants in the above entitled cause, from a decree and judgment of the Circuit Court of Boone county, Missouri, in favor of the plaintiff establishing her right as a pretermitted heir.

The sole ground assigned, by counsel for appellants, for a reversal of the judgment is thus stated: "The court committed error in admiting the testimony of certain witnesses as to the identity of Jane

Butler's own declaration with no other proof, and also as to her relation to John Butler for the same reason."

"The fact of the relationship of the declarant must be established by evidence other than her own declaration before the declaration became admissible," or to put it another way, "Not only is it necessary in order that the declaration of a person afterwards deceased should be admissible in cases of pedigree, that the declarant should have been related to the family in question or connected with the same by marriage, but this relationship must be established by some proof other than the declaration itself." Or further, the rules of evidence governing statements of this kind are:

1. The statement must be made *ante litem motam.*

2. A prior condition to both of these is, that it should be proved by some source of evidence independent of the statement itself, that the person making the statement is related to the family of which she speaks.

In support of that proposition we are cited to the following authorities: 1 Wharton on Evidence, p. 209; Elliot on Evidence, sec. 380 and 381; Wigmore on Evidence, sec. 1490; 16 Cyc. 1229; Kennedy's Trial Evidence, p. 22; 2 Jones on Evidence, p. 712.

In brief, the position of counsel for appellant is this: That there is no evidence whatever preserved in this record, which shows or warranted the trial court in finding that the woman and child who appeared in Paris, in October, 1863, and known as Jane Butler and Lizzie Butler, were the wife and child of John Butler, late of Sturgeon, Boone county, Missouri, or that Jane and Lizzie were their true names, save and except in declarations of the former, to the effect that such were their names, and that they bore those relations to him.

Under the authorities cited, counsel insist that these declarations were inadmissible in evidence for the reasons previously stated; and that they should be stricken out by this court, the judgment reversed and the bill dismissed, for the reason that when so stricken out, there would remain no sufficient evidence to support the findings of the court.

The clearest and soundest statement of the rule governing the admission of declarations of persons as to pedigree and relationship, is stated in 16 Cyc. 1229, as follows:

"Notwithstanding an early tendency to regard intimate acquaintance with the family as a sufficient basis for knowledge as to facts of pedigree, and so to receive the declarations of family physicians,

intimate friends, persons living in the family, or servants and other persons having adequate knowledge of facts of family genealogy or opportunities for acquiring it, the rule is now settled that, both in cases of reputation and of direct statements, the only competent declarants are those related to the family; and that consequently the declarations as to pedigree made by intimate friends, neighbors, or even by persons living in the family, or by servants, however trustworthy or long employed in the family, are incompetent.

"A second condition of relevancy is that the declarant should be disinterested to the extent of having no motive which can fairly be assumed to be such as would induce him to state the fact otherwise than as he understood it. The statement therefore must be shown to have been made *ante litem motam; a fortiori,* before commencement of a suit involving the issue to which the declaration relates. It is not material, however, that a controversy has arisen regarding a cognate matter, unless indeed it clearly foreshadows one on the precise subject-matter of the declaration; that a controversy, since entirely abated, once existed; or that a state of affairs is known to exist out of which a controversy may at any time arise. On the other hand, the declaration is inadmissible if a controversy in fact exists, although the declarant be ignorant of it, or it has not reached the state of litigation. A declaration, made expressly with a view to a probable future contest is admissible *quantum valeat;* but declarations made in the process of collecting evidence to substantiate the claim involved in a subsequent *lis* are incompetent.

"It is universally held that declarations in pedigree cases are not admissible unless the declarant is dead."

Some of the States announce a more liberal rule; for instance the Court of Appeals of California, in the case of In re Clark's Estate, 110 Pac. 828, held that the declarations of the deceased father of claimants to the estate of an intestate that the intestate was his sister, made in the lifetime of the intestate, were admissible without extrinsic preliminary proof of the relationship of the father to the intestate.

This same general principle seems to be supported by the following authorities: 2 Wigmore on Ev. sec. 1491; In re Hartman's Estate, 107 Pac. (Cal.) 105; Overby v. Johnston, 42 Tex. Civ. 438; Fowler v. Simpson, 79 Tex. 614; Sitler v. Gehr, 105 Pac. 577; Smith v. Smith, 140 Wis. 599; Hubatka v. Meyerhofer, 79 N. J. L. 264; Mann v. Cavanaugh, 110 Ky. 776.

In our opinion, the former rule is the wiser and more sound of the two, for the reason that if the preliminary proof of relationship is

not required, great injustice might be done, or a gross fraud perpetrated by a designing person, by simply declaring that he or some member of his family was related to a deceased person, who has no opportunity to contradict the statement, or disprove the fact.

It should be borne in mind, that such evidence is purely hearsay, unsanctioned by any form of oath, therefore no punishment could be inflicted upon the declarant while living, for his prevarication, nor successfully combatted in many cases after death. For this reason, it seems to us, that a reasonable weight of preliminary proof of relationship should be required before receiving the declarations of such witnesses. In other words, all reasonable precautions should be used to protect the fountain source of such evidence, which at best is very unsatisfactory, from fraud and pollution. The degree of such proof must of necessity depend largely upon the facts and circumstances of each particular case, and no hard and fast or unbending iron rule can be laid down and enforced alike in all cases.

The following cases will somewhat illustrate the degree of such proof that is required in a case: Fulkerson v. Holmes, 117 U. S. 1. c: 397; Vowles v. Young, 13 Ves. 147; Monkton v. Attorney-General, 2 Russ. & M. 157; Young v. Schullenberg, 165 N. Y. 385; In re Bobb's Estate, 37 S. C. 19; Brown v. Lazarus, 5 Tex. Civ. 105, 81; Fowler v. Simpson, *supra;* Louder v. Schluter, 78 Tex. 105, 22 Am. & Eng. Ency. Law (2nd ed.) 644 and cases cited; Layton v. Kraft, 98 N. Y. S. 72.

So considering this case under the rule of the law thus enunciated, were the declarations of Mrs. Jane Butler, regarding the relationship she and Lizzie Butler, the respondent in this case bore to John Butler of Sturgeon, Missouri, admissible in evidence?

In our opinion, that question should be answered in the affirmative, for the reason that in our judgment this record abounds with such preliminary proof, and is ample to satisfy even a more stringent rule than that announced by the authorities before mentioned.

We, therefore, affirm the judgment. All concur.

CITIZENS' RAPID TRANSIT CO. v. DEW.

100 Tenn. 318. (1897)

WILKES, J. This is an action for negligently injuring and killing a dog. It was commenced before a Justice of the Peace, and, on appeal, was tried in the Circuit Court, before the court and a jury. There have been two trials the first resulting in a mistrial, and the second in a verdict and judgment for $250, and defendant, Rapid Transit Company, has appealed and assigned many errors.

Much evidence is given in the case upon the question of the dog's pedigree and ancestry. The objections are made that these matters are attempted to be proven by general reputation, and this is characterized as hearsay. But the question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs, or men. The matter, from the very nature of things depends upon reputation or common repute. It is shown that certain books are kept, and in them is shown a registration of pedigrees kept up for the information of the public, not only as to horses, but also as to cattle and dogs. These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths, and marriages are received with regard to the human family. 18 Am. & Eng. Encyc. L. 258; Flowers v. Haralson, 6 Yer. 494; Rogers v. Park, 4 Hum. 480; Swink v. Frence, 11 Lea. 79; Morris v. Swaney, 7 Heis, 591; Ford v. Ford, 7 Hum. 92. It is true, that in family records the entries in the books are usually made by the relatives and friends of the person, but inasmuch as dogs have no relatives competent to make entries for them, it is allowable for such entries to be made by the owners, friends, and admirers of the dog.

Upon the general question as to the admissibility of evidence of the dog's pedigree, and the qualities and performances of his ancestors, we think there can be no doubt that such evidence is competent. It is certainly competent to show pedigree upon the question of value of horses, cattle, and even sheep and swine—their different strains of blood, and especially as to horses and cows it is competent to show the qualities of the sires and dams and more remote ancestry, as these matters enter largely into the question of values. It is a matter of common knowledge that the same questions enter in the consideration of the value of dogs, not only such as are kept for common use, such as guard dogs, shepherd dogs, Newfoundland dogs,

but also such as are kept for sporting purposes, such as grey, blood, and fox hounds, bird dogs and others. There are high and low degrees among dogs as well as among men, and while the common coon dog has his value, it is not the same as that of the trained bird dog or the trained bloodhound. It is a matter of common knowledge and observations that certain strains of blood among horses add materially, if they do not entirely fix their values, and so among cows, hogs and sheep, and even among chickens and turkeys. Different strains of blood horses are valuable because it is found that for generations the achievements of horses of that strain have been noteworthy upon the turf and elsewhere, and so with dogs these qualities, as a matter of common observation, are much the same in the same strain for generation after generation. We think there is no error in admitting evidence upon these matters of pedigree, and the reputation of this particular dog killed is shown to have had what in dog circles, is regarded as "blue blood," and among these he belongs to the inner circles of the four hundred, a member of the F. F. T. or First Families of Tennessee.

Affirmed.

DECLARATIONS AGAINST INTEREST BY PERSONS SINCE DECEASED.[1]

DEAN v. WILKERSON.

126 Ind. 338. (1890)

COFFEY, J. This was an action by the appellee against the appellant on a promissory note executed by the appellant to the appellee. The defense sought to be established in the Circuit Court was that the note in suit was executed without any consideration.

The note was executed in renewal of two other notes executed by the appellant to Thomas Wilkerson, the father of the appellee, found in the possession of the appellee, but not endorsed to him.

It was contended by the appellant in the Circuit Court that the notes, in renewal of which the note in suit was executed were the property of Thomas Wilkerson, and for that reason the note in suit, having been made payable to the appellee was without any consideration.

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[1] Hughes on Evidence, p. 97.

On the other hand it was contended by the appellee that the two notes in renewal of which the note in suit was executed had been given to him by Thomas Wilkerson, the father, in a distribution among his children of the notes held by the father.

The evidence as to whether the appellee was the owner of the two notes above mentioned was conflicting. We will not undertake to weigh the evidence. The objection, therefore, that the verdict of the jury is not supported by the evidence cannot be sustained.

Finally, it is contended by the appellant that the court erred in admitting the evidence of Alonzo G. Smith, Lafayette Wilkerson and Charles D. Butler.

The evidence of these witnesses consisted of declarations made by Thomas Wilkerson, father of the appellee, who departed this life before the trial of the cause, to the effect that he had made a gift to the appellee of the notes in consideration of which the note in suit was executed.

These declarations were made in the absence of the appellant, and as Thomas Wilkerson was not a party to the suit it is contended that his declarations constituted hearsay evidence, and that they were not, for that reason, admissible.

It is to be observed that Thomas Wilkerson was dead and could not be produced in court as a witness on behalf of the appellee. The declarations introduced in evidence were against the interests of Thomas Wilkerson, and related to a fact about which he possessed competent knowledge. This constitutes one of the exceptions to the general rule upon the subject of hearsay evidence. 1 Greenleaf Ev., section 147; Royse v. Leaming, 72 Ind. 182.

Mr. Greenleaf, vol. 1, sec. 148, in discussing the admissibility of this class of evidence, says: "The ground upon which this evidence is received, is the extreme improbability of its falsehood. The regard which men usually pay to their own interests is deemed a sufficient security, both that the declarations were not made under any mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true."

We cannot presume that Thomas Wilkerson did not possess knowledge as to whether he made a gift to his son James of the notes, constituting the consideration of the note in suit; nor can we presume he would declare he had parted with his title unless such declaration was true. In our opinion the court did not err in admitting this evidence.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

KEESLING, Treas. et al. v. POWELL.

149 Ind. 372. (1897)

McCABE, J. The appellee sued the appellants, treasurer, auditor, and commissioners of Cass county, to enjoin the sale of a certain described lot or piece of real estate in Logansport, in said county, for the alleged delinquent taxes, and to cancel said tax as the same stands charged on the duplicate, on the ground that the same had been paid. A trial of the issues joined and resulted in a finding and judgment for the plaintiff, over defendant's motion for a new trial.

The refusal of a new trial is questioned by the assignment of errors, that being the only question presented by the appeal. The grounds of the motion for a new trial are that the finding is contrary to law and the evidence, and not supported by sufficient evidence, and error in the admission of certain evidence.

The evidence, the admission of which is complained of, was the testimony of the plaintiff, who being about to purchase the lot in question, inquired of the deputy treasurer, one William H. Forrest, whether said taxes were paid or not. And it is further objected that the public cannot be estopped by the declarations of its officials respecting the public revenues. But it is a mistake to suppose that the object of the testimony was to estop anybody. The issue on trial was whether the tax in question had been paid. There was no attempt to defeat the collection of the tax on any other ground than that it had been actually paid.

The evidence shows that the deceased deputy treasurer whose declarations were put in evidence had the requisite means of knowing whether the matter declared was true. It also appears that it would be against the interest of the deputy treasurer, who practically performed all the duties of the county treasurer, to admit or declare that these taxes had been paid if they in fact had not. It might result in making the treasurer liable on his bond for the same, and the deputy liable to the treasurer, if in fact they had been paid to the deputy treasurer. In Royse, Exr. v. Leaming, 72 Ind., at p. 184,

Woods, J. speaking for the court, said: "If the action of the court in admitting this testimony can be upheld, it must be on the ground that the declarations in question are secondary evidence, receivable only because of the death of the person who made them. Upon this subject, the following language is found in 1 Greenleaf Evidence, sec. 147; 'This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; that the declarations were at variance with his interest. When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations.'" And in Dean v. Wilkerson, 126 Ind. 340, Coffey, J., speaking for the court, said "It is to be observed that Thomas Wilkerson was dead and could not be produced in court as a witness in behalf of the appellee. The declarations introduced in evidence were against the interests of Thomas Wilkerson, and related to a fact about which he possessed competent knowledge. This constitutes one of the exceptions to the general rule upon the subject of hearsay evidence. 1 Greenleaf Ev. sec. 147; Royse exr. v. Leaming, 72 Ind. 182.

Following these decisions, as we do, there was no error in admitting the declarations of the deceased deputy treasurer in evidence.

The Circuit Court did not err in overruling the appellants' motion for a new trial.

Judgment affirmed.

COUNTY OF MAHASKA v. INGALLS, Ex'r.

16 Iowa 81. (1864)

This action was brought against the executor of John H. Shoemaker, deceased, and the sureties on his official bond as treasurer.

The cause was, by consent, referred to three referees "for trial of the facts involved in the issues (made) by the pleadings."

The referees in their report, find, that from the commencement of Shoemaker's term until his death, he was a defaulter in the sum of $3,415.44. They further find "that there was a default on the

part of Shoemaker on or about the 20th of August, 1858, in the sum of $2,700. That we have no means of determining from the evidence when the remainder of the defalcation took place, whether between the 20th of August, 1858, and the execution of the defendant's bond, or subsequent to the execution of said bond. We do not know affirmatively that there was any defalcation after the execution of defendant's bond, nor do we find negatively that there was not any."

On the trial before the referees, plaintiff raised certain questions relating to the admission of testimony, which are set out in the opinion; and in the District Court made these the basis of a motion to set aside the report, which was overruled and exceptions taken by the plaintiff.

On the report, the court rendered judgment in favor of the plaintiff for $715.44 (being the amount of the whole deficit less the $2,700 which occurred before the bond in suit was executed), with interest from the date of the report. From this judgment both parties appeal.

DILLON, J. Against the plaintiff's objection, the witness was permitted to testify as follows:

"Mr. Shoemaker told me that there was over $2,000 in the summer of 1858, that he was behind as treasurer of the county, and he wanted an arrangement made by which I should pay it. I agreed to fix it up, if Moreland would secure me. I afterward saw Moreland, and he agreed to do so, but never done it, and the arrangement was not perfected. This conversation was about August 20, 1858."

Against the plaintiff's objection, likewise, one Coolbaugh was permitted to testify, "That the said John H. Shoemaker, in the summer of 1858, stated in the presence of Coolbaugh that he, the said Shoemaker, was then behind with the county of Mahaska, in the sum of about $2,700."

The materiality and decisive importance of this testimony are apparent from the statement of the case above given, and from the report of the referees and the judgment of the court thereon; and whether this cause shall be affirmed or reversed, depends solely upon the admissibility in law of this evidence.

The inquiry, then, as to the state of Shoemaker's accounts, at and before the time the bond in suit was executed, was one of indispensable importance. It may be inferred from the report of the referees, that his official books and papers threw no light on this subject.

In this exigency, the sureties offered the testimony of which the

plaintiff now complains. This testimony consisted of the verbal admissions of their principal on two separate occasions, and to two different persons, prior to the execution of the bond in suit, that he was behind, as treasurer of the county, in the sum of about $2,700. And here it is material to be noted, that these declarations, or more properly speaking, admissions, are distinctly and unequivocably stamped with the following marked features:

1st. They were made against the pecuniary interest of the declarant, for they were of such a nature so circumstantial and precise, as to constitute in an action against him by the plaintiff, the foundation and evidence of a legal liability to that extent.

2nd. They involved, moreover, the admission of conduct on his part, which would render him, if known, infamous in the eyes of the public, and criminal in the eyes of the law; for the penal statutes of the State declare, that every officer who shall unlawfully "take, convert, invest, use, loan, or fail to account for, any portion of the public money entrusted to him, shall be imprisoned in the penitentiary, fined in a sum equal to the amount embezzled, and be also disqualified from holding any office under the laws or constitution of the State. Rev. sec. 4243.

3rd. They were not only made *ante litem motam,* but were made long prior to the execution of the bond in suit, and consequently without any reference to the controversy which has since arisen.

4th. The declarant was dead at the time these admissions of his were offered and received as evidence in an action between third parties, viz., between the county and his sureties.

Such were the circumstances and nature of these admissions, and now the question recurs: Were they competent and legal evidence?

If these same facts had appeared by written entries or statements, the deecased party being in a position to know the facts, and the facts being undeniably adverse to his interest, there is no question as to their being receivable in evidence. All the authorities would here agree.

In the case at bar the declarations were verbal and the question yet remains to be considered whether verbal admissions stand upon the same footing with written ones.

Our survey and examination of this subject may be thus summed up. This species of evidence being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the

evidence to be brought clearly within all the conditions requisite for its reception. From the unbroken current of English and the decided preponderance of American authority, we think the present state of the law is, that verbal declarations are receivable, when accompanied by the following prerequisites: 1st: The declarant must be dead, to this we believe the English cases make no exception. Mere absence from the jurisdiction will not answer. Brewster v. Doane, 2 Hill (N. Y.) 537, and cases; Moore v. Andrews, 5 Port. Ala. 107. Although by the course of decisions in some of the states, with reference to written entries, etc., absence might be possibly treated as equivalent to death. See 1 Greenl. Ev. sec. 163, and note; 8 Watts, 77; 1 Smith, L. Cas. 340 (top); as to insanity, Union Bank v. Knapp, 3 Pick. 96. As, in the case at bar, the declarant was deceased, we need not decide whether death is, in all cases, an indispensable condition. We need only say that probably the courts would not be inclined to relax the rule so as to dispense with this condition, unless it might be in the case of confirmed insanity.

2nd. The next prerequisite is, that the declaration must have been against the interest of the declarant at the time, and that interest must be a pecuniary one. That it would have subjected the party to penal consequences is not sufficient, although this would add to the weight of the testimony. (Davis v. Lloyd, 1 C. K. 275; 11 Cl. & Fin. 85). The conflict of the declaration with the pecuniary interest of the party must be clear and undoubted, as this is the main ground upon which the admissibility of this species of evidence rests.

3rd. The declaration must be of a fact or facts in relation to a matter concerning which the declarant was immediately and personally cognizable. 11 M. & W. 773. As the evidence is admitted because the declaration is against interest, it is not indispensable that it should accompany an act, but if not so accompanied, it very greatly depreciates its value. Phillipps Ev. vol. 1, 310; 1 Greenl. Ev. sec. 147; Ivat v. Finch, 1 Taunt. 141; White v. Choteau, 1 E. D. Smith, 493, and cases, *supra*.

4th. In addition, the court should under the circumstances of the particular case, be satisfied that there was no probable motive to falsify the fact declared; as where the declaration is made *ante litem motam*, or at a period so remote as to preclude all suspicion that it was manufactured for the occasion. Gilchrist v. Martin, 1 Bailey Eq. 492, and cases, *supra*.

When all of these conditions are met, the evidence is received for

what it is worth, and its weight and value depend upon the circumstances of the particular case.

Judgment affirmed.

HUMES v. O'BRYAN & WASHINGTON.

74 Ala. 64. (1883)

This action was brought by O'Bryan & Washington, partners doing business in the city of Nashville, Tennessee, against L. R. Glover and Milton Humes, as partners doing business under the firm name of Glover & Humes; and Glover having died, the suit was prosecuted to judgment against Humes alone, as surviving partner. The action was commenced on the 22nd September, 1873, and was founded on an account for goods sold and delivered by plaintiffs, during the year 1872, to said Glover & Humes, amounting to about $750. The complaint contained the common counts only. The defendant Humes pleaded the general issue, "in short by consent," and two special pleas, denying his liability as a partner in the alleged firm of Glover & Humes, and denying that the account was contracted by him or by any one authorized to bind him; and the cause was tried on issue joined on these several pleas.

Geo. S. Gordon, whose deposition was taken by the defendant, thus testified: "I heard L. R. Glover speak in reference to the business relations between himself and the defendant (Humes). He stated, emphatically and repeatedly, that the partnership or business connection between them had never been for anything but planting purposes only, and that for debts contracted by him (Glover) Humes was not liable, and knew nothing about them when they were contracted. He further said, that there were written articles of agreement between himself and Humes, which he did not have, and the substance of which he could not recollect, except that they related solely to planting and the planting business, and never at any time related to anything else; that the only occasion when he heard their content read, was when they were read in Humes' office to Ledbetter. Glover further disowned any knowledge of the telegrams, until these suits were instituted." The witness further stated that these declarations were made by Glover in the office of Humes & Gordon, no person but the three being present, and that they were made with

special reference to the liability of Humes on the account here sued on. The plaintiffs objected to the interrogatories calling for these declarations, and on their motion, the court excluded the entire deposition; to which ruling the defendant excepted.

SOMERVILLE, J. It is an established rule of evidence, that while, in ordinary cases, the mere declarations of a person as to a particular fact are not evidence of that fact, being regarded as hearsay; yet declarations made by a person which are at variance with his pecuniary interest, are admissible in evidence of their own truth, under certain circumstances. These conditions are, that the declarant possessed competent knowledge of the facts and is deceased at the time his declarations are proposed to be proved. The absence of any motive of a pecuniary nature which would tempt him to falsehood, creates a strong intrinsic probability of the truth of his declaration; and it is, therefore, admitted as secondary evidence, after the death of the declarant, being the best which the nature of the case will, under the peculiar circumstances, permit. 1 Greenl. Ev. sec. 147; Starkies' Ev. (Shar.) 64; Higham v. Ridgway, 2 Smith's Lead. Cases, 183; 1 Whart. Ev. sec. 226 and following. The weight and value of such evidence depends, of course, upon many considerations of a variable character. Raines v. Raines, 30 Ala. 425.

We are of the opinion that the declaration of Glover, testified to by witness Gordon in his deposition, comes within the class of declarations against interest, under the principle above announced. Glover's declaration was, that the appellant, Humes, was never his partner, except in the planting business; and this statement appears to have been made with special reference to the pecuniary liability of the parties on the claim which is the basis of the present suit. The death of Glover was proved, and it was shown furthermore, that there were no assets of the alleged mercantile partnership of Glover & Humes, the reputed firm, as such, being regarded as insolvent at the time of Glover's declaration. This fact, it must be noticed, is of vital importance as affecting the question of interest. In the absence of the fact of insolvency, it is manifest that the converse proposition —that Humes was a partner of the declarant—would be a declaration against his interest. This is so because, if true, it would entitle Humes to a half interest in the partnership assets belonging to the alleged firm of Glover & Humes. The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true,

to this extent doubled the ultimate amount of Glover's liability, by destroying his right of recourse against Humes for any portion of the debts due by the reputed firm. 2 Wharton Ev. sec. 1200.

Reversed and remanded.

MASSEE-FELTON LUMBER COMPANY v. SIRMANS.

122 Ga. 297. (1905)

COBB, J. Sirmans applied for an injunction to restrain the Massee-Felton Lumber Company from felling the timber on a described tract of land. The judge granted the injunction, and the defendant excepted.

The right of the plaintiff to an injunction depends upon whether he has shown that he is the owner of the land and that the threatened damage would be irreparable.

The evidence relied upon to establish the existence of a tax execution and the fact of a levy was an entry made by the sheriff in a private memorandum book kept by him during his lifetime, which was found among his papers after his death and produced at the trial as coming from the custody of his family. This entry was in the following words: "Georgia, Berrien County. Record of sale of land for 1871 and 1872 and 1873. Sold on the first Tuesday in April, 1871, lot No. 313 in the 10th District of said county as the property of T. F. Hampton, to satisfy a tax *fi. fa.* issued by the tax-collector of said county; said land was knocked off to John C. Sirmans, he being the highest and best bidder, at $10.50, and the money applied to said tax *fi. fa.* Thomas D. Futch, Sheriff, B. C."

If this memorandum was admissible in evidence, it established the existence of the tax execution as the foundation of the sale which is referred to in the sheriff's deed. If this entry was admissible at all, it was admissible under that principle of the law which admits in evidence declarations of a person since deceased, against his interest and not made with a view to pending litigation. Civil Code, sec. 5181. This section of the code is a mere codification of a well-settled principle in the law. While such evidence is hearsay, it is admitted as one of the exceptions to the rule against hearsay evidence, on the ground of the extreme improbability of its falsity. Field v. Boynton, 33 Ga. 239; Ellwell v. Mtg. Co., 101 Ga. 496 (3); Ga. R. Co. v. Fitz-

gerald, 108 Ga. 509. To render such an entry or declaration admissible it must appear that the declarant is dead, that he possessed competent knowledge of the facts, or that it was his duty to know them, and that the declaration was at variance with his interest. 1 Gr. Ev. (16th ed.) sec. 147. But when the declaration contains that which is against the interest of the declarant and also that which is in his favor, its admissibility has been doubted. The settled rule seems, however, now to be that the statements in the declaration should be balanced, and if those in favor of interest are equal to or preponderate over those that are against the declaration should not be admitted, but that if those against interest preponderate over those that are in favor of the interest the declarations are admissible. 1 Gr. Ev. (16th ed.) sec. 157.

But in any case where the declaration is admissible it is admissible as proof of all the facts therein stated, both the main fact and any collateral fact connected therewith.' The leading case in reference to this matter is Higham v. Ridgway, 10 East, 109, in which an entry of services rendered as a man midwife, followed by the entry, "paid 25th Oct. 1768," was admitted to show the date of the child's birth. See also 1 Gr. Ev. (16th ed.) sec. 152. The declaration by the sheriff that he had sold the land under a tax execution was certainly a declaration against his interest, because by an admission of this fact he laid himself liable to all the consequences which would result to a levying officer selling the property of another when he had no authority to make such sale. In the entry he also charged himself with the amount of the purchaser's bid, but he also discharged himself by a statement that he applied it to the payment of the tax. Upon the balancing of the statements set forth in the declaration it would seem that the balance preponderated against his interest, the only statement in his interest being that he had appropriated the money in the way the law required, and this would be of little benefit to him in the event he was sought to be held liable on account of want of authority to make the sale, or for any irregularity therein for which persons interested in the property would have a right to hold him responsible. We think that, under the rule stated, this entry was properly admitted in evidence, and that when admitted it established the existence of the tax execution.

Judgment affirmed. All the Justices concur.

KEESLING v. POWELL.

149 Ind. 372. (1897)

McCABE, J. The appellee sued the appellants, treasurer, auditor, and commissioners of Cass county, to enjoin the sale of a certain described lot or piece of real estate in Logansport, in said county, for alleged delinquent taxes, and to cancel said tax as the same stands charged in the duplicate, on the ground that the same had been paid. A trial of the issues joined resulted in a finding and judgment for the plaintiff, over defendant's motion for a new trial.

The refusal of a new trial is questioned by the assignment of errors, that being the only question presented by the appeal. The grounds of the motion for a new trial are that the finding is contrary to law and the evidence, and not supported by sufficient evidence, and error in the admission of certain evidence.

The evidence, the admission of which is complained of, was the testimony of the plaintiff, who, being about to purchase the lot in question, inquired of the deputy treasurer, one William H. Forest, whether said taxes had been paid, and he answered that they had. This evidence of the mere declaration of the deputy treasurer, it is claimed, was mere hearsay, and not admissible. But it is conceded that at the time of the admission of the testimony of the plaintiff, detailing the declaration of deputy treasurer Forrest, that the declarant, Forrest, was dead. It is also objected that it was no part of the duty of the treasurer to tell people whether taxes were paid or not. And it is further objected that the public cannot be estopped by the declaration of its officials respecting the public revenues. But it is a mistake to suppose that the object of the testimony was to estop anybody. The issue on trial was whether the tax in question had been paid. There was no attempt to defeat the collection of the tax on any other ground than that it had been actually paid.

The evidence shows that the deceased deputy treasurer whose declarations were put in evidence had the requisite means of knowing whether the matter declared was true. It also appears that it would be against the interest of the deputy treasurer, who practically performed all the duties of the county treasurer, to admit or declare that these taxes had been paid if they in fact had not. It might result in making the treasurer liable on his bond for the same, and the deputy liable to the treasurer, if in fact they had been paid to the deputy treasurer. In Royse, Exr. v. Leaning, 72 Ind. at

p. 184, Woods, J., speaking for the court, said: "If the action of the court in admitting this testimony can be upheld, it must be on the ground that the declarations in question were secondary evidence, receivable only because of the death of the person who made them. Upon this subject the following language is found in 1 Greenleaf Evidence, section 147: 'This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest. When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other consideration.'" And in Dean v. Wilkerson, 126 Ind. at p. 340, Coffey, J., speaking for the court, said: "It is to be observed that Thomas Wilkerson was dead and could not be produced in court as a witness on behalf of the appellee. The declarations introduced in evidence were against the interests of Thomas Wilkerson, and related to a fact about which he possessed competent knowledge. This constitutes one of the exceptions to the general rule upon the subject of hearsay evidence. 1 Greenleaf Ev., section 147; Royse, Exr. v. Leaning, 72 Ind. 182.

"Mr. Greenleaf, vol. 1, section 148, in discussing the admissibility of this class of evidence, says: 'The ground upon which this evidence is received, is the extreme improbability of its falsehood. The regard which men usually pay to their own interests is deemed a sufficient security, both that the declarations were not made under any mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true.'"

Following these decisions, as we do, there was no error in admitting the declarations of the deceased deputy treasurer in evidence.

The Circuit Court did not err in overruling the appellant's motion for a new trial.

Judgment affirmed.

HUMES v. O'BRYAN & WASHINGTON.

74 Ala. 64. (1883)

This action was brought by O'Bryan & Washington, partners doing business in the city of Nashville, Tennessee, against L. R. Glover and Milton Humes, as partners doing business under the firm name of Glover & Humes; and Glover having died, the suit was prosecuted to judgment against Humes alone, as surviving partner. The action was commenced on the 22d September, 1873, and was founded on an account for goods sold and delivered by plaintiffs, during the year 1872, to said Glover & Humes, amounting to about $750. The complaint contained the common counts only. The defendant Humes pleaded the general issue, "in short by consent," and two special pleas, denying his liability as a partner in the alleged firm of Glover & Humes, and denying that the account was contracted by him, or by any one authorized to bind him; and the cause was tried on issue joined on these several pleas.

Geo. S. Gordon, whose deposition was taken by the defendant, thus testified: "I heard L. R. Glover speak in reference to the business relations between himself and the defendant (Humes). He stated, emphatically and repeatedly, that the partnership or business connection between them had never been for anything but planting purposes only, and that for debts contracted by him (Glover) Humes was not liable, and knew nothing about them when they were contracted. He further said, that there were written articles of agreement between himself and Humes, which he did not have, and the substance of which he could not recollect, except that they related solely to planting and the planting business, and never at any time related to anything else; that the only occasion when he heard their contents read, was when they were read in Humes' office to Ledbetter. Glover further disowned any knowledge of the telegrams, until these suits were instituted." The witness further stated, that these declarations were made by Glover in the office of Humes & Gordon, no person but the three being present, and that they were made with special reference to the liability of Humes on the account here sued on. The plaintiffs objected to the interrogatories calling for these declarations, and, on their motion, the court excluded the entire deposition; to which ruling the defendant excepted.

SOMERVILLE, J. It is an established rule of evidence, that while, in ordinary cases, the mere declarations of a person as to a particu-

lar fact are not evidence of that fact, being regarded as hearsay; yet declarations made by a person which are at variance with his pecuniary or proprietary interest, are admissible in evidence of their own truth, under certain circumstances. These conditions are, that the declarant possessed competent knowledge of the facts, and is deceased at the time his declarations are proposed to be proved. The absence of any motive of a pecuniary nature, which would tempt him to falsehood, creates a strong and intrinsic probability of the truth of his declaration; and it is, therefore, admitted as a secondary evidence, after the death of the declarant, being the best which the nature of the case will, under the peculiar circumstances, permit. 1 Greenl. Ev. sec. 147; Starkie's Ev. (Shar.) 64; Higham v. Ridgway, 2 Smith's Lead. Cases, 183; 1 Whart. Ev. sec. 226, *et seq.* The weight and value of such evidence depends, of course, upon many considerations of a variable character. Raines v. Raines, 30 Ala. 425.

We are of the opinion that the declaration of Glover, testified to by the witness Gordon in his deposition, comes within the class of declarations against interest, under the principle above announced. Glover's declaration was that the appellant, Humes, was never his partner, except in the planting business; and this statement appears to have been made with special reference to the pecuniary liability of the parties on the claim which is the basis of the present suit. The death of Glover was proved, and it was shown, furthermore, that there were no assets of the alleged mercantile partnership of Glover & Humes, the reputed firm, as such, being regarded as insolvent at the time of Glover's declaration. This fact, it must be noticed, is of vital importance as affecting the question of interest. In the absence of the fact of insolvency, it is manifest that the converse proposition—that Humes was a partner of the declarant—would be a declaration against his interest. This is so because, if true, it would entitle Humes to a half interest in the partnership assets belonging to the alleged firm of Glover & Humes. The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's liability, by destroying his right of recourse against Humes for any portion of the debts due by the reputed firm. 2 Whart. Ev. sec. 1200.

Reversed and remanded.

CURRIER v. GALE.

80 Massachusetts 504. (1860)

Action of Tort for breaking and entering a close in Ambury. Answer, soil and freehold in the defendant's wife. Trial and verdict for the plaintiff in the Superior Court in Essex at September term, 1859, before Morton, J., who reported the case to this court, under St. 1859, c. 196, sec. 32. The facts are stated in the opinion.

DEWEY, J. It is conceded that Molly Barnard was the legal owner of the premises in 1799, and that the plaintiff as her sole heir at law holds her interest, unless it has been acquired by some third party, by conveyance or otherwise. Such transfer of title was attempted to be shown by a mortgage to David Currier, and a levy of execution in favor of Ebenezer Moseley against said Currier; but that title was found not valid by the jury, under proper instructions from the court, upon which no question is now open. This finding of the jury brings the case to the single question of the rejection of the evidence offered by the defendant to sustain a title acquired by adverse possession.

The title by adverse possession was alleged to have been acquired by Jacob R. Currier, who received a deed from Moseley, the judgment creditor of David Currier, on the 4th of April, 1823, after his levy of execution. The defendant, who was introduced as a witness on the trial, after testifying that one Webster occupied the premises from about 1825 for a period of twelve or fifteen years, was asked "What Webster had said during the time of his occupation, in regard to his occupancy, for the purpose of showing that he occupied as tenant to Jacob R. Currier, and adversely to the plaintiff." A similar inquiry was proposed as to the declaration of one Bartlett, who subsequently occupied the premises, and for the like purpose. The court rejected the evidence.

The defendant insists that it was competent, under the general rule of admitting the declarations of a party in possession, adverse to his own interest. Such declarations have in various forms and under different circumstances been deemed admissible. The principle upon which they are held admissible is not very clearly settled. When the declaration has been accompanied with an act pointing out some monument or existing mark of boundary, it has been allowed. So also as evidence against the party making the declaration, and all persons in privity with them, or claiming under him, it is competent. But the adjudicated cases go somewhat further, and hold that his

declaration in disparagement of his apparent title, as indicated by his possession, may be used as evidence that his occupation was an occupation under another person, and thus make his possession to avail in favor of the person stated by him to be his landlord. Thus in Peaceable v. Watson, 4 Taunt. 16, it was held, that the declarations of a deceased occupant of land, stating under whom he occupied as tenant, were admissible—Mansfield, C. J. saying: "Possession is *prima facie* evidence of seisin in fee simple; the declaration of the possessor that he is tenant to another makes most strongly therefore against his own interest, and consequently is admissible." Davies v. Pierce, 2 T. R. 53, is an authority to the same point. The case of Marcy v. Stone, 8 Cush. 4, is directly to the same effect. If these declarations were offered as the declarations of deceased persons, while occupying the premises, they would have been therefore admissible.

On the other hand, if they were offered as the declarations of persons now alive, they ought to be rejected. In 1 Phil. Ev. (4th Amer. ed.) 304, it is said that the declaration of a living person, however much against his interest, cannot be received unless in case of a party to the suit, or a person identified in interest. In Barrows v. White, 4 B. & C. 328, Littledale, J. says: "It is a general rule that, when a person is living and can be called as a witness, his declaration made at another time cannot be received as evidence; thus the declarations of a tenant at the time of his holding, or of a steward, cannot be admitted unless they are dead." The case of Spargo v. Brown, 9 B. & C. 935, is to the same effect. In Phillips v. Cole, 10 Ad. & El. 106, it was said: "The declarations of third persons alive, in the absence of any community of interest, are not to be received to effect the title and interest of other persons merely because they are against the interest of those who make them. The general rule of law, that the living witness is to be examined on oath, is not subject to any exception so wide."

In Daggett v. Shaw, 5 Met. 228, Bartlett v. Emerson, 7 Gray, 174 and Ware v. Brookhouse, 7 Gray, 456, the rule is assumed to be that the admission of such declarations is confined to the declarations of persons who were deceased at the time of the trial.

As the rejection of the proposed evidence seems to have been upon the general ground of the incompetency of all declarations of tenants, and not restricted to the declarations of living persons, the court are of opinion that the verdict must be set aside and a new trial had,

applying the rule of law as above stated to the declarations of any tenant, that may be offered in evidence.

New trial ordered.

DEAN v. WILKERSON.

126 Ind. 338. (1890)

COFFEY, J. This was an action by the appellee against the appellant on a promissory note executed by the appellant to the appellee. The defense sought to be established in the Circuit Court was that the note in suit was executed without any consideration.

The note was executed in renewal of two other notes executed by the appellant to Thomas Wilkerson, the father of the appellee, found in the possession of appellee, but not endorsed to him.

It was contended by the appellant in the Circuit Court that the notes, in renewal of which the note in suit was executed, were the property of Thomas Wilkerson, and for that reason the note in suit, having been made payable to the appellee, was without any consideration.

On the other hand it was contended by the appellee, that the two notes in renewal of which the note in suit was executed had been given to him by Thomas Wilkerson, the father, in a distribution among his children of the notes held by the father.

The evidence as to whether the appellee was the owner of the two notes above mentioned was conflicting. We will not undertake to weigh the evidence. The objection, therefore, that the verdict of the jury is not supported by the evidence cannot be sustained.

Finally, it is contended by the appellant that the court erred in admitting the evidence of Alonzo G. Smith, Lafayette Wilkerson and Charles D. Butler.

The evidence of these witnesses consisted of declarations made by Thomas Wilkerson, father of the appellee, who departed this life before the trial of the cause, to the effect that he had made a gift to the appellee of the notes, in consideration of which the note in suit was executed.

These declarations were made in the absence of the appellant, and as Thomas Wilkerson was not a party to the suit it is contended

that his declarations constituted hearsay evidence, and that they were not, for that reason, admissible.

It is to be observed that Thomas Wilkerson was dead and could not be produced in court as a witness on behalf of the appellee. The declarations introduced in evidence were against the interests of Thomas Wilkerson, and related to a fact about which he possessed competent knowledge. This constitutes one of the exceptions to the general rule upon the subject of hearsay evidence. 1 Greenleaf Ev., section 147; Royse v. Leaming, 72 Ind. 182.

Mr. Greenleaf, vol. 1. section 148, in discussing the admissibility of this class of evidence, says: "The ground upon which this evidence is received, is the extreme improbability of its falsehood. The regard which men usually pay to their own interest is deemed a sufficient security, both that the declarations were not made under any mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true."

We cannot presume that Thomas Wilkerson did not possess knowledge as to whether he made a gift to his son, James, of the notes, constituting the consideration of the note in suit; nor can we presume he would declare he had parted with his title unless such declaration was true. In our opinion the court did not err in admitting his evidence.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

CURRIER v. GALE.

80 Mass. 504. (1860)

Action of tort for breaking and entering a close in Amesbury. Answer soil and freehold in the defendant's wife. Trial and verdict for the plaintiff in the Superior Court in Essex at September term, 1859, before Morton, J., who reported the case to this court, under St. 1859, c. 196, sec. 32. The facts are stated in the opinion.

DEWEY, J. It is conceded that Molly Barnard was the legal owner of the premises in 1799, and that the plaintiff as her sole heir at law holds her interest, unless it has been acquired by some third party,

by conveyance or otherwise. Such transfer of title was attempted to be shown by a mortgage to David Currier; but that title was found not valid by the jury, under proper instructions from the court, upon which no question is now open. This finding of the jury brings the case to the single question of the rejection of the evidence offered by the defendant to sustain a title acquired by adverse possession.

The title by adverse possession was alleged to have been acquired by Jacob R. Currier, who received a deed from Mosely, the judgment creditor of David Currier, on the 4th of April, 1823, after his levy of execution. The defendant, who was introduced as a witness on the trial, after testifying that one Webster occupied the premises from about 1825 for a period of twelve or fifteen years, was asked "what Webster had said during the time of his occupation in regard to his occupancy for the purpose of showing that he occupied as tenant to Jacob R. Currier, and adversely to the plaintiff." A similar inquiry was proposed as to the declarations of one Bartlett, who subsequently occupied the premises, and for the like purpose. The court rejected the evidence.

The defendant insists that it was competent, under the general rule of admitting the declarations of a party in possession, adverse to his own interest. Such declarations have in various forms and under different circumstances been deemed admissible. The principle upon which they are held admissible is not very clearly settled. When the declaration has been accompanied with an act pointing out some monument or existing mark of boundary it has been allowed. So also as evidence against the party making the declaration, and all persons in privity with him, or claiming under him, it is competent. But the adjudicated cases go somewhat further, and hold that his declaration in disparagement of his apparent title, as indicated by his possession, may be used as evidence that his occupation was an occupation under another person, and thus make his possession to avail in favor of the person stated by him to be his landlord. Thus in Peaceable v. Watson, 4 Taunton 16, it was held, that the declarations of a deceased occupant of land stating under whom he occupied as tenant, were admissible—Mansfield, C. J., saying: "Possession is *prima facie* evidence of seisin in fee simple; the declaration of the possessor that he is tenant to another makes most strongly therefore against his own interest, and consequently is admissible." Davies v. Pierce, 2 T. R. 53, is an authority to the same point. The case of Marcy v. Stone, 8 Cush. 4, is directly to the same effect. If these declarations were

offered as the declarations of deceased persons, while occupying the premises, they would have been therefore admissible.

On the other hand, if they were offered as the declarations of persons now alive, they ought to be rejected. In L. Phil. Ev. (4th Amer. ed.) 304 it is said that the declaration of a living person, however much against his interest, cannot be received unless in the case of a party to the suit, or a person identified in interest. In Barrows v. White, 4 B. & C. 328, Littledale, J., says: "It is a general rule that, when a person is living and can be called as a witness, his declaration made at another time cannot be received as evidence; thus the declarations of a tenant at the time of his holding or of a steward, cannot be admitted unless they are dead." The case of Spargo v. Brown, 9 B. & C. 935, is to the same effect. In Phillips v. Cole, 10 Ad. & El. 106, it was said: "The declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title and interest of other persons merely because they are against the interest of those who make them. The general rule of law, that the living witness is to be examined on oath, is not subject to any exception so wide."

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As the rejection of the proposed evidence seems to have been upon the general ground of the incompetency of all declarations of tenants, and not restricted to the declarations of living persons, the court are of opinion that the verdict must be set aside, and a new trial had, applying the rule of law as above stated to the declarations of any tenant, that may be offered in evidence.

New trial ordered.

THE COUNTY OF MAHASKA v. INGALLS.

16 Iowa 81. (1864)

This action was brought against the executor of John H. Shoemake, deceased, and the sureties on his official bond as treasurer.

The cause was, by consent, referred to three referees "for trial of the facts involved in the issues (made) by the pleadings."

The referees in their report, find, that from the commencement of Shoemake's term until his death, he was a defaulter in the sum of $3,415.44. They further find "that there was a default on the part of Shoemake on or about the 20th of August, 1858, in the sum of $2,700. That we have no means of determining from the evidence when the remainder of the defalcation took place, whether between the 20th of August, 1858, and the execution of said bond, nor whether the money constituting the said defalcation or any part thereof was in the hands of Shoemake at the time of the execution of said bond.

We do not know affirmatively that there was any defalcation after the execution of defendants' bond, nor do we find negatively that there was not any."

On the trial before the referees, plaintiff raised certain questions relating to the admission of testimony, which are set out in the opinion; and in the District Court made these the basis of a motion to set aside the report, which was overruled and exceptions taken by the plaintiff.

On the report, the court rendered judgment in favor of the plaintiff for $715.44 (being the amount of the whole deficit less the $2,700 which occurred before the bond in suit was executed), with interest from the date of the report. From this judgment both parties appeal.

DILLION, J. Against the plaintiff's objection, the witness was permitted to testify as follows: "Mr. Shoemake told me that there was over $2,000 in the summer of 1858, that he was behind as treasurer of the county, and he wanted an arrangement made by which I should pay it. I agreed to fix it up, if Moreland would secure me.

I afterward saw Moreland, and he agreed to do so, but never done it, and the arrangement was not perfected. This conversation was about August 20th, 1858."

Against the plaintiff's objection, likewise, one Coolbaugh was permitted to testify, "That the said John H. Shoemake, in the summer of 1858, stated in the presence of Coolbaugh that he, the said Shoemake, was then behind with the county of Mahaska, in the sum of about $2,700."

The materiality and decisive importance of this testimony are apparent from the statement of the case above given, and from the report of the referees, and the judgment of the court thereon; and whether this cause shall be affirmed or reversed, depends solely upon the admissibility in law of this evidence.

The inquiry, then, as to the state of Shoemake's accounts, at and before the time the bond in suit was executed, was one of indispens-

able importance. It may be inferred from the report of the referees, that his official books and papers threw no light upon this subject. In this exigency, the sureties offered the testimony of which the plaintiff now complains. This testimony consisted of the verbal admissions of their principal on two separate occasions, and to two different persons, prior to the execution of the bond in suit, that he was behind, as treasurer of the county, in the sum of about $2,700. And here it is material to be noted, that these declarations, or more properly speaking, admissions, are distinctly and unequivocally stamped with the following marked features:

1st. They were made against the pecuniary interest of the declarant, for they were of such a nature, so circumstantial and precise, as to constitute in an action against him by the plaintiff, the foundation and evidence of a legal liability to that extent.

2d. They involved, moreover, the admission of conduct on his part, which would render him, if known, infamous in the eyes of the public, and criminal in the eyes of the law; for the penal statutes of the State declare, that every officer who shall unlawfully "take, convert, invest, use, loan, or fail to account for, any portion of the public money entrusted to him, shall be imprisoned in the penitentiary, fined in a sum equal to the amount embezzled, and be also disqualified from holding any office under the laws or constitution of the State." Rev. 4243.

3d. They were not only made *ante litem motam,* but were made long prior to the execution of the bond in suit, and consequently without any reference to the controversy which has since arisen.

4th. The declarant was dead at the time these admissions of his were offered and received as evidence in an action between third parties, viz., between the county and his sureties.

Such were the circumstances and nature of these admissions, and now the question recurs: Were they competent and legal evidence?

If these same facts had appeared by written entries or statements, the deceased party being in a position to know the facts, and the facts being undeniably adverse to his interest, there is no question as to their being receivable in evidence. All the authorities would here agree.

In the case at bar the declarations were verbal and the question yet remains to be considered whether verbal admissions stand upon the same footing as written ones.

Our examination and survey of this subject may be thus summed up. This species of evidence being somewhat anomalous in its char-

acter, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the evidence to be brought clearly within all the conditions requisite for its reception. From the unbroken current of English and the decided preponderance of American authority, we think the present state of the law is, that verbal declarations are receivable, when accompanied by the following prerequisites: 1st. The declarant must be dead.

To this we believe the English cases make no exception. More absence from the jurisdiction will not answer. Brewster v. Doane, 2 Hill (N. N.), 537, and cases; Moore v. Andrews, 5 Port. Ala. 107.

Although by the course of decisions in some of the States, with reference to written entries, etc., absence might possibly be treated as equivalent to death. See 1 Greenl. Ev., 163, and note; 8 Watts. 77; 1 Smith, L. Cas., 340 (top); as to insanity, Union Bank v. Knapp, 3 Pick. 96. As, in the case at bar, the declarant was deceased, we need not decide whether death is, in all cases, an indispensable condition. We need only say, that probably the courts would not be inclined to relax the rule so as to dispense with this condition, unless it might be in the case of confirmed insanity.

2d. The next prerequisite is, that the declaration must have been against the interest of the declarant at the time, and that interest must be a pecuniary one. That it would have subjected the party to penal consequences is not sufficient, although this would add to the weight of the testimony. (Davis v. Lloyd, 1 C. & K. 275; 11 Cl. & Fin. 85.) The conflict of the declaration with the pecuniary interest of the party must be clear and undoubted, as this is the main ground upon which the admissibility of this species of evidence rests.

3d. The declaration must be a fact or facts in relation to a matter concerning which the declarant was immediately and personally cognizable. 11 M. & W. 773. As the evidence is admitted because the declaration is against interest, it is not indispensable that it should accompany an act, but if not so accompanied it very greatly depreciates its value. Phillipps Ev., vol. 1, p. 310; 1 Greenl. Ev., 147; Ivat v. Finch, 1 Taunt. 141; White v. Choteau, 1 E. D. Smith, 493, and cases, *supra*.

4th. In addition, the court should, under the circumstances of the particular case, be satisfied that there was no probable motive to falsify the fact declared; as where the declaration is made *ante litem motam*, or at a period so remote as to preclude all suspicion that it

was manufactured for the occasion. Gilchrist v. Martin, 1 Bailey Eq., 492, and cases, *supra*.

When all of these conditions are met, the evidence is received for what it is worth, and its weight and value depend upon the circumstances of the particular case.

Judgment affirmed.

DECLARATIONS RELATING TO PUBLIC AND GENERAL INTERESTS.[1]

ENFIELD v. WOODS.

212 Mass. 547. (1912)

Bill in Equity, filed in the Superior Court on June 9, 1908, by the town of Enfield against Caroline D. Woods, the sole devisee under the will of her late husband Cyrus F. Woods, to enjoin the defendant from removing a soldiers' monument from a parcel of land of about three quarters of an acre known as the "Common" alleged to belong to the plaintiff and to have been acquired by an open, adverse and uninterrupted possession and use and occupation by the plaintiff of more than ninety years.

The answer alleged ownership of the land by the defendant.

LORING, J. This case is before us on an appeal from a decree in favor of the plaintiff after all but one of the defendant's exceptions to the master's report had been overruled, and after a plea to the jurisdiction also had been overruled.

The bill is brought by the town of Enfield as owner of the fee in a lot of land known as the "Common," to enjoin the defendant (who claimed to own the land) from removing from it a soldier's monument erected pursuant to a vote of the town.

The exception sustained by the Superior Court was to the finding of the master "that the town did acquire by parol gift title to said 'Common' including the land in dispute, and at a time before the year 1814."

The next question or questions submitted to the court by the master concern the admission of the testimony of one Bestor and one Harwood. Bestor was allowed to testify against the defendant's objection

[1] Hughes on Evidence, p. 78.

that he was seventy-eight years old and had lived in Enfield all his life; that his grandmother, one of the old settlers of the town, came there in 1802 and died in 1857; and that "he had heard his grandmother and the rest of the old people talk about it and say that Robert Field gave the common and burying ground to the town of Greenwich." Harwood was allowed to testify that his father, who died in 1908 at the age of seventy-eight, told him "that his (the witness's grandfather said that Robert Field gave this piece of land to the South Parish of Greenwich for a common."

We assume on the report that there was no evidence that the declarations made by Harwood's grandfather and those made by Bestor's grandmother and "the rest of the old people" (referred to in his testimony) were made "upon the personal knowledge of the declarants." For that reason the testimony cannot be taken to have been admitted under R. L. c. 175, sec. 66.

These declarations, being declarations upon a matter of general if not of public interest, are within one of the exceptions to the rule excluding hearsay evidence so far as the subject matter of them is concerned; as to this see Hall v. Mayo, 97 Mass. 416, 418; Boston Water Power Co. v. Hanlon, 132 Mass. 483, 484.

It is generally laid down that evidence to be admissible under this exception to the rule against hearsay must be evidence of a general or common reputation as to the existence or non-existence of the matter of public or general interest. See for example Starkie on Evidence (10th Am. ed.) 47-49; 1 Phillips on Evidence (6th ed.) 236; 1 Greenleaf on Evidence (5th ed.) sec. 128; Wigmore on Evidence, secs. 1584-5. The statement of the rule heretofore made in our decisions might raise the question whether reputation evidence in this connection means anything more than evidence which is reputed to be the fact as distinguished from evidence which is known by the declarant to be the fact and so to include the individual assertion of a deceased person not made on personal knowledge. See Gray, J., in Hall v. Mayo, *ubi supra,* and Devens, J., in Boston Water Power Co. v. Hanlon, *ubi supra.*

We do not find it necessary to pass upon that question here. For if this exception is limited to cases where there was a general or common reputation, we are of opinion that it would be going too far to limit the exception to cases where the declarant stated that there was a general reputation. Since it is not possible to determine by a preliminary examination whether there was or was not a general

reputation, we are of opinion that testimony by a witness that he had heard the fact "from old persons" now deceased is competent evidence of a general or common reputation. Bestor's testimony therefore was competent so far as this matter is concerned. And see Wigmore on Evidence, sec. 1584. If it is competent to prove a general or common reputation by the declaration of one person that he had heard the fact from old persons now deceased, it is equally competent tc prove a general or common reputation by putting in evidence the declarations of many persons where each declarant heard of the fact from one person only. Where all the residents of the place in question are severally shown to have made the statement, a general or common reputation is made out in proof. In like manner a general or common reputation where many although not all are shown to have made individual assertions of the fact. We are therefore of opinion that Harwood's testimony, in connection with Bestor's was admissible so far as this consideration is concerned.

It has been said that evidence, to be admissible under this exception to the rule against hearsay, must be evidence of the general right and not of particular facts. Starkie on Evidence (10 Am. ed.) 49. 1 Phillips on Evidence (6th ed.) 638. The Queen v. Bliss, 7 A. E. 550. But as it is pointed out in Wigmore on Evidence, sec. 1585, the more correct statement of this limitation of the exception here in question is that the declarations to be admissible must be declarations of the public or general right and not of the particular exercise of it. It is no objection to Bestor's and Harwood's testimony that the declarations testified to by them dealt with the particular fact that the common right began in a parol gift made by Robert Field, for whom the plaintiff town was named.

Decree affirmed.

SOUTH-WEST SCHOOL DISTRICT v. WILLIAMS.

48 Conn. 505. (1881)

Civil action to recover for an entry into and injury to a schoolhouse belonging to the plaintiffs; brought originally before a justice of the peace and by appeal to the Superior Court in Tolland county, and there tried to the jury before Harvey, J. Verdict for the plaintiffs and motion for a new trial by the defendants.

LOOMIS, J. The complaint alleges a malicious injury by the defendants to the school-house and furniture therein belonging to the plaintiffs. The defendants' answer denies the ownership of the plaintiffs, and alleges that the school-house belonged to Ruth A. Williams one of the defendants.

The counsel for the defendants called upon Ruth A. Williams, one of the defendants, as a witness, and for the purpose of proving the time when the school-house was erected by the plaintiffs, asked her—"Did your mother or great-grandmother tell you when the school-house was built—before or after the death of Joseph Webster?"—which, upon the plaintiffs' objection, was excluded by the court.

The objection was not to the fact—which is conceded to have been material—but only to the mode of proving it, namely, by the declarations of the witness's mother and great-grandmother.

In support of the claim that the evidence was admissible the defendants invoke the benefit of an exception to the general rule excluding hearsay evidence upon the ground that the matter in question was of public and general interest.

As included within this exception the authorities mention boundaries of counties, towns and other territorial divisions, rights of common, claims of highways and ferries, and in this and some other states the boundaries of lands of individuals. But no such fact as the one now in question has ever been mentioned as proper to be included in this class.

The fallacy on the part of the defendants seems to be in assuming that because a school-house is a public building for a public purpose, the precise date of its erection must also be matter of public or general interest to be proved by traditionary evidence; and therefore one of the defendants attempts, by repeating the unsworn statement of her deceased mother or grandmother as to a date, to change this public matter of a school-house into her own private property.

And this well illustrates the danger of extending the exception so as to embrace particular facts and dates. In this case there was doubtless other and better evidence to be found in the records of the school district or from living witnesses. But however this may have been, a reference to the reason for admitting traditionary evidence in public matters will show that particular dates like this ought not to be included. The law does not dispense with the sanction of an oath and the test of cross-examination as a prerequisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth.

The matters included in the class under consideration are such that many persons are deemed cognizant of them and interested in their truth, so that there is neither the ability nor the temptation to misrepresent that exists in other cases; and the matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination, while the persons whose declarations are offered in evidence must have been in a situation to know the truth. After passing such an ordeal it is reasonably safe to accept the result as established fact. But if the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guaranty for its correctness; so that the general rule excluding hearsay evidence applies in full force. The human memory is proverbially treacherous even in regard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate with date some more striking fact.

The ruling of the court excluding the evidence is vindicated not only by the reasons we have given, but also by decided cases which are so similar to the case at bar as to be identical in principle.

In Frazer v. Hunter, 5 Cranch C. C. 470, it was held that when the question is upon a disputed boundary line the court will not permit hearsay evidence to be given that a particular object, such as a spring, was in the land of one of the parties.

In Ireland v. Powell, Peake's Evidence, 14, where the question was whether a turnpike was erected within or out of the limits of the town of Wem, Mr. Justice Chambre permitted the plaintiff, who contended that it was within the town, to give evidence of general reputation that the town extended to a close called the Townsend Piece, and that old people since deceased had said that such was the boundary of the town; but he would not suffer it to be proved that those persons had said that there were formerly houses where none then stood, observing that this was evidence of a particular fact and not of general reputation. See also Cooke v. Banks, 2 Car. & P., 478; Weeks v. Sparke, 1 Maule & Selw. 687. And in 1 Swift's Digest, 766, it is said that the tradition of a particular fact is not admissible.

A new trial is not advised.

In this opinion the other judges concurred.

CADWALADER v. PRICE.

111 Md. 310. (1909)

BOYD., C. J. This is an appeal from a judgment rendered in favor of the defendant (appellee) in an action of ejectment instituted in Harford county and removed for trial to the Superior Court of Baltimore City. The land sued for is described in the declaration by courses and distances, and contains one-half acre, more or less.

The parcel of land claimed by defendant as the landing is less than half an acre, and while most of the witnesses did not know the boundaries of it except as pointed out in 1883 by Jackson Dorney, there was unquestionable evidence tending to show that there was a parcel of land known as King's Creek.

He went upon the land in 1883 and pointed out to a number of persons, who were witnesses in this case, the lines of King's Creek Landing—telling them that a line between two stones which were then there (and the places where they stood were located on the plat by the surveyor) was the western boundary, and a marsh from the north stone to King's Creek was the northern boundary and King's Creek was the eastern and southern boundaries. There ought no longer to be any question in Maryland about the right to prove private boundaries by the declarations of deceased persons, subject, of course, to certain well recognized limitations. If such evidence were excluded, on the ground that it was hearsay, it would be impossible, in portions of the State where there is still controversy over boundary lines, to establish the corners and lines of ancient tracts. It is said in Dorsey on Ejectment, 57-58: "It may be asked, how can a witness be called to identify a boundary made in 1680? The law does not require this. It is generally true that hearsay is not evidence; yet from necessity there are certain exceptions. The inquiries of a jury are directed to identify a boundary, and it may be proved by traditional evidence. The rules of evidence permit a witness to refer to the declarations of a deceased person who was on the survey. As in consanguinity, so boundaries may be proved by hearsay evidence; but the declarations of living witnesses cannot be received, nor the declarations of a person interested in establishing the fact."

It was held by the Provincial Court in Howell v. Tilden, 1 H. & McH. 84 that: "Traditional evidence of what an ancestor of the plaintiff, who was seized of the lands in question fifty years ago, at that time did say concerning the bounds of those lands, ought

be given in evidence to the jury, and the weight of it left to the jury." Redding v. McCubbin, 1 H. & McH. 368, is to the same effect. In Ridgely v. Ogle, 4 H. & McH. 123, it was held that: "A plat returned in an ancient ejectment is admissible in evidence upon the same principle that hearsay evidence is allowed to prove boundaries." See also Scott v. Ollabaugh, 3 H. & McH. 511, and Snavely v. McPherson, 5 H. & J. 150. In Hall v. Gittings, 2 H. & J. 121, the declarations of a former holder of the adjoining lands as to the bounds of the land in dispute were held competent and admissible in evidence, it not appearing to the court by the plots that he was interested in establishing the truth of the facts related by him to the witnesses. See also Bladen v. Cockey, 1 H. & McH. 232; Weems v. Disney, 4 H. & McH. 156. Other cases might be cited, but they cannot be found either in the notes in Dorsey on Ejectment or in Mr. Brantly's Annotated Edition of the early cases. Although in the later decisions of this court the question may not have been passed on, it is because the rule has been too generally recognized to admit of controversy. An examination of the records in some of the latter cases will doubtless show that such testimony has been received, and the writer of this opinion knows that in the many actions of ejectment and *trespass quare clausam fregit* which have arisen in Western Maryland it has been the unquestioned practice to prove boundaries by traditional evidence.

The general rule in this country is thus stated in 4 Am. & Eng. Ency. of L. 851: "Declarations of deceased persons are admissible in evidence in questions relating both to public and private boundary lines, provided they were made *ante litem motam* and by a person who had peculiar means of information, and who had no interest in the matter at issue at the time they were made." In 5 Cyc. 956, it is said: "Hearsay evidence as to boundaries is admissible when there has been so great a lapse of time as to render it difficult to prove the original boundary lines by the existence of the primitive landmarks," and on page 957, "Reputation or tradition is very generally held to be admissible in evidence to prove an ancient boundary, whether public or private, although in England and a few of the United States its admissibility to prove a private boundary is limited to cases where it is shown that such boundary is co-incident with a public or *quasi*-public one. Such reputation or tradition must, however, be ascertained as to the subject-matter as direct evidence would be, and it is not admissible to contradict evidence of record; and in

all cases proof of ancient boundaries by common reputation must have reference to a time *ante litem motam.*"

In this case the declarations of Jackson Dorney were made at a time he had no interest in making them, before any controversy about the land in question had arisen, when he was pointing out the boundaries and he had died some years before the trial. He was the former owner and occupant of the farm and landing and hence was familiar with the facts.

Judgment affirmed, the appellant to pay the costs above and below.

HATHAWAY v. GOSLANT.

77 Vt. 199. (1904)

Trespass or cutting and drawing away trees from plaintiff's land. Plea, the general issue. Trial by jury at September Term 1903. Washington county, Haselton, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The evidence on both sides showed that the plaintiff's farm is bounded on the east by the town of Marshfield, on the south by land of Fred Lamberton, on the north by land of Henry Dow.

The exceptions state that: "There was no controversy regarding any line of the plaintiff's land, or of Dow's, except the line between Dow and the plaintiff. That line was in controversy. The plaintiff claimed that it went northerly of the line claimed by Dow. The points of controversy on the Marshfield town line were six rods apart, between Dow and the plaintiff. The dispute was as to the timber cut between those two lines.

The plaintiff's evidence tended to show that a certain ash tree, which was one in question, was a line tree between his farm and Dow's while the defendant's evidence tended to show that this tree was on Dow's land, a few feet from the line that Dow claimed to; and that he purchased the tree of Dow. The evidence also tended to show that the plaintiff's father owned the land in question for many years, and until his death in 1886. The plaintiff was called as a witness, and the following questions and answers were admitted, against the objection and exception of the defendant: "Q. Now, speaking about this ash tree, I ask if at some time your father told you that was the line between his land and the land which is called the Dow

land in this trial? A. Yes, sir. Q. And when was this? A. A year or two before he died in 1886. He died in 1886, and I mean a year or two before that." The plaintiff had previously testified that there never was, to his knowledge, any dispute as to this line up to the time of the cutting of the timber in question in 1901. In the court below, the objection to this evidence was general, and in this court, the only reasons urged by the defendant why the evidence should have been excluded are, that the first question was leading, and that "the subject-matter of the examination as inquired about was not admissible." It does not appear that the defendant objected to the question because it was leading, nor that the court did not allow the question to be answered as a matter of discretion; and for these reasons the objection that the question was leading is not sustained. The objection, that "the subject-matter of the examination as inquired about was not admissible," presents no question respecting the qualification of the plaintiff's father to speak upon the subject of the line in question; and we have only to consider whether the subject-matter was a proper subject of inquiry. The admissibility of declarations to show boundaries has been considered by this court in several reported cases, and while the holdings have not been entirely uniform, as will be seen from an examination of the cases of Wood v. Willard, 36 Vt. 82; Turner Falls Lumber Co. v. Burns, 71 Vt. 354; Evarts v. Young, 52 Vt. 329; Childs v. Kingsbury, 46 Vt. 47, and Powers v. Sibley, 41 Vt. 288, we think the better reasoning is found in those cases where it is held that declarations similar to those in question are admissible; and we hold that the questions which were objected to related to a proper subject of inquiry. In Wood v. Willard, 37 Vt. 377, it is held, that the declarations of deceased persons who had actual knowledge as to the location of a disputed boundary, or, who, from their connection with the property itself, or their situation and experience in regard to such boundaries and the surveys thereof, had peculiar means of knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon or in the immediate vicinity of the boundary referred to, and pointing it out, are admissible evidence as to the location of such boundary, when, from lapse of time, there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject. But this rule has been somewhat modified by subsequent holdings. Thus, in Powers v. Sibley before cited, it is held, that it is not necessary that the declarant be upon or in the immediate vicinity of the boundary in dispute, and pointing it out, in order to make

his declaration admissible. In this case the declaration was held admissible, notwithstanding it did not accompany and give character to any act affecting the declarant's title. In Childs v. Kingsbury and Turner Falls Lumber Co. v. Burns before cited, it is held, that the rule that the declarant must have no interest to misrepresent does not require that he be wholly disinterested in the subject. In both of these cases it is held, that the fact that the declarant is the owner of the land at the time the declaration is made does not show that he is interested to misrepresent; and that declarations made by such owners of land, who have since deceased, are admissible. In Wood v. Willare, 36 Vt. 82, it is said, that there are cases where a party may prove his own declarations, or those of a former owner, in his own chain of title, where they accompany an act, or a possession, as giving it explanation and character; and in Evarts v. Young, before cited, it is said that a party is not allowed to show his own declarations, or the declarations of those through whom he claims title, in his own favor, unless such declarations accompany and give character to some act affecting his title, and so become a part of the *res gestae*. The rule thus stated is a rule of general application, and allows declarations to be shown when they accompany and give character to acts, as a part of the *res gestae*, when the act itself is admissible as evidence; and declarations respecting boundaries may be made under circumstances that bring them within this rule, but their admission is not controlled by it. The rule which permits a party to show the declarations of a person who has deceased, respecting boundaries, is an exception to the rule that excludes hearsay evidence; and under it, such declarations may be received as evidence, notwithstanding they are not a part of the *res gestae*, and their admission is not dependent on whether they accompany and give character to some act affecting the declarant's title. Wood v. Willard, 37 Vt. 377.

Judgment affirmed.

PUBLIC AND ANCIENT DOCUMENTS.[1]

LINDSAY v. CITY OF CHICAGO.

115 Ill. 120. (1885)

CRAIG, J. This is an appeal from a judgment of the County Court of Cook County, confirming a special assessment. What purports to be a copy of the ordinance is attached to the petition. It was essential for the city, in order to obtain a judgment or confirmation, to aver and prove that an ordinance authorizing the improvement had been passed.

But it is contended that the evidence before the court established the existence of an ordinance, while on the other hand it is contended that the passage of an ordinance could only be established by the production of the journal containing the proceedings of the city council, and that the journal must show that the yeas and nays were taken, and that a majority of the members elected voted for the ordinance on the call of the yeas and nays.

It is too plain to admit of argument, that where the ordinances of a town or city have been printed in book or pamphlet form, purporting to be published by authority of the board of trustees or city council, the book shall be received as evidence of the passage of the ordinance, because this is the plain language of the statute. But a book of ordinances was not put in evidence. The petitioner, in lieu of the book, put in evidence a certified copy, attested by the clerk, under the seal of the corporation. This, in our opinion, proved the passage of the ordinance as effectually as the fact would have been proven had a printed book of ordinances been admitted. The language found in the first part of section 4,—"All ordinances, and the date of publication, may be proven by the certificate of the clerk, under the seal of the corporation,"—will admit of no other construction. It is said this means that you may thus prove the contents of an ordinance. But such is not the language of the act. The legislature no doubt intended, by the use of this language, that a certified copy of an ordinance, under the seal of the corporation, made by the clerk of the council, should have the same force and effect, as evidence, as a printed book of ordinances, which, in express terms, is

[1] Hughes on Evidence, pp. 83 and 91.

made evidence of the passage and publication of an ordinance.

The judgment of the County Court will be affirmed.

BOSTON WATER POWER CO. v. JAMES HANLON.

132 Mass. 483. (1882)

Writ of entry to recover a parcel of land in Brookline. Plea, *nul disseisin*. At the trial in the Superior Court, before Colburn, J. the jury returned a verdict for the tenant; and the demandant alleged exceptions to the exclusion of certain evidence, the nature of which appears in the opinion.

DEVENS, J. The finding of the judge who presided at the trial that the plottings for plans and the field notes of Mather Withington, a surveyor long since deceased, did not appear to have been made by the authority or procurement of the grantors of either party to this action, cannot be here reviewed. Walker v. Curtis, 116 Mass. 98, they did not come from the custody of either party to this action, but from that of the administratrix of Withington. The demandant contends that they were admissible for the purpose of showing the true location of a creek which was the boundary line of the mill corporation under whom the demandant claimed, and thus its relation to what was known as the Punch-Bowl Road, in the same way that ancient maps, plans and deeds between strangers are held admissible. Sparkhawk v. Bullard, 1 Met. 95. Morris v. Callanan, 105 Mass. 129. Drury v. Midland Railroad, 127 Mass. 571.

The evidence of such ancient documents is admitted upon the ground that, although between strangers, they are of such a character as usually accompany transfers of title or acts of possession, and purport to form a part of actual transactions referring to coexisting subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated. But plottings for plans and field notes are memoranda only, which may never have been acted on. They are preparations for a transaction which may never have taken place. The fact that they are so full that plans could be made from them is not important; they still lack the element which makes plans admissible.

Nor are they admissible as the declarations of a person deceased. The rule which permits the introduction of reputation of tradition,

or declarations of persons deceased, as to matters of public or general interest, does not extend to questions of private boundary. Hall v. Mayo, 97 Mass. 416.

As we are of opinion that the plottings and field notes were rightly rejected, which was the only question argued before us, the entry must be

Exceptions overruled.

LAWRENCE v. TENNANT.

64 N. H. 532. (1888)

Trespass, *qu. cl.* for cutting down and carrying away trees growing on the plaintiff's land in Epsom. Facts found by a referee. The defendants justified under one Steele, who was the owner of two "Home" lots lying adjacent to the plaintiff's land in the "Gore" so-called. The question was as to the true location of the line between the Home lots and the Gore, that being the line between the plaintiff's land and that of Steele. The plaintiff was shown a plan which was marked "plot of the town of Epsom, taken on a scale of 100 rods to an inch July 2, 1800, D. L. Morril," and testified,—"That plan was given to my father by Dr. Sam Morril, brother of Gov. Morril, who made it. We gave it to Nathan Griffin," Upon cross-examination he testified,—"Father told me Dr. Morril gave it to him. I saw this plan when father was plowing, when I was a young man; am now sixty-nine years old. When I first saw it, it was at our house. Nathan Griffin told me father gave it to him. Father used to have it in his surveying tools. Father was a surveyor. Can't tell how long from first time to last time I saw it in father's possession. Father lived where I lived. He lived there till he died. Father died about 1858."

George W. Lane, a surveyor, was shown this plan, and testified,—"I have seen Morril plan. I have had it, and handed it to one of plaintiff's counsel. I had it of Mr. John Dolbear, of Epsom, who wrote History of Epsom for County History. I have had this plan before this; the first time I went to survey these premises I had this plan with Master Nathan Griffin, an old surveyor; had it in 1884—October, I think." Upon this evidence, and subject to exception the plan was ruled in.

BLODGETT, J. The true rule as to receiving documents, ancient or otherwise, in evidence is conceived to be this: The party offering the paper must make out a *prima facie* case for its inspection; he must show that the paper is apparently as he contends. If he wholly fail to do this, the court should reject the paper; but if there be a reasonable probability established that the paper is what it purports to be, the question then becomes one for the jury, and the paper ought to go before them with proper instructions.

The real question affecting the consideration of such documents with the tribunal before which they are offered is, whether they are genuine, and contain a true statement of what they purport to contain. If found to possess these requisites there is no reason why they may not be read in evidence. Gibson v. Poor, 21 N. H. 446. In this case both of these requisites appear. An inspection of the plan leaves no doubt that it is an ancient and much worn document, and, taken in connection with the reported evidence, establishes a reasonable probability that it is what it is marked and purports to be, namely, "A plot of the town of Epsom, taken on a scale of one hundred rods to an inch in the year 1800, by D. L. Morril."

The antiquity and genuineness of the plan thus appearing, it was of course admissible if made by public authority; and if not so made, it was none the less admissible, there having been preliminary evidence of its correctness. Other grounds of admissibility need not be considered.

Judgment for the plaintiff on the report.

WHITMAN v. HENEBERRY.

73 Ill. 109. (1874)

By CRAIG, J. This was an action of ejectment, brought by Mathew Henneberry in the Circuit Court of Marshall county, against appellants to recover a certain quarter section of land in Marshall county. The venue of the cause was changed to Peoria county, where a trial was had before a jury, which resulted in a verdict in favor of appellee. The court overruled a motion for a new trial, and rendered judgment upon the verdict.

The patent, the original deed from Clark to Eldred, and the deed

from Hodges to Henneberry, were all burned in the office of Burns & Barnes, in Lacon, on the 16th day of April, 1871.

The deed from Clark to Eldred was not acknowledged as required by law in force at the time it was executed. It was however, allowed to be read in evidence by the court as an ancient deed, and in this, it is insisted by the appellants, the court erred, for the reason, as it is claimed, the proper foundation was not laid to permit the instrument to be read as an ancient deed.

Deeds that are more than thirty years old are called ancient deeds, and they are admitted in evidence without proof of execution; but before this can be done, it must appear that the instrument comes from such custody as to show a reasonable presumption of its genuineness, and facts and circumstances must be proven which will establish the fact that the instrument has been in existence the length of time indicated by its date.

It is difficult to lay down a general rule as to the character of proof necessary to be given; but where the deed comes from the proper custody and facts and circumstances are proven to the court from which it may be reasonably inferred that the deed has had an existence for over thirty years, such ought to be sufficient, where it is entirely free from any just ground of suspicion.

The deed was shown to be in existence for a period of over fifty years, and shown to be in custody of Eldred and his heirs who were claiming to own the land under it, and paying the taxes from year to year.

We are aware of no act that could have been done by Eldred or his heirs that would have entitled them, or their grantee, to a more favorable consideration in a court of justice in regard to the deed, unless they had taken actual possession of the land under the deed, which in law they were not bound to do in order to be entitled to read it in evidence as an ancient deed.

Judgment affirmed.

GIBSON v. POOR.

21 N. H. 441. (1850)

Trespass, for breaking and entering the close of the plaintiffs, in Goffstown, and carrying away a quantity of their wood and timber. Plea—the general issue.

The jury returned a verdict for the defendant, and the plaintiffs moved to set the same aside and for a new trial, for supposed error in the rulings of the court. And the questions arising upon said motion were transferred to this court for decision.

EASTMAN, J. It is believed to be a well settled principle, that lines, monuments, and boundaries which are established and undisputed, although not immediately connected with the land in controversy, are nevertheless proper and competent evidence to be considered by a jury, where they tend to elucidate the subject in dispute. The manner in which the lands of this country were originally surveyed and occupied, has rendered such kind of evidence oftentimes the most satisfactory in ascertaining the true line between adjoining lots, or the line adopted and recognized as true by the original settlers. Mr. Greenleaf, in his work on evidence, remarks, that by far the greatest portion of our territory was originally surveyed in large masses or tracts, owned either by the State, or by the United States, or by one or a company of proprietors; under whose authority these tracts were again surveyed and divided into lots suitable for single farms, by lines crossing the whole tract and serving as the common boundary of very many farm lots lying on each side of it. So that it is hardly possible to prove the original boundaries of one farm without affecting the common boundary of many. 1 Greenleaf. Ev. sec. 145, note. These remarks apply in their full force to the original survey of lands in this State. Proprietors of tracts and townships held their meetings, appointed their surveyors, run out their lands, made plans and maps of the same, drew their rights and made conveyances when deemed necessary. These records and plans are the source of most of the titles to real estate within our limits; and when properly verified are always received in evidence in all matters to which they refer. Such is the constant practice of the courts in this State, and such is also the general practice of most other jurisdictions. Records of original proprietors, their plans and maps, the location of lands by the ancient settlers, and all evidence, whether documentary or parol, which bears upon the point at issue and is not inadmissible upon general principles, is received in cases of disputed boundary. In Smith v. Perwitt, 2 A. K. Marsh. (Ky.) Rep. 158, it is said that boundary may be proved by every kind of evidence which is admissible to establish any other fact; and, where the boundary is ancient, even reputation is admissible. To the same effect are Taylor v. Rowe et al. 4 Hawks, 116; Smith v. Norvells, 2 Littell, 159; Ralston v. Miller, 3 Rand. 44. In some respects courts have gone farther in breaking over established

principles of evidence upon this subject than upon almost any other. Hence hearsay, not amounting to tradition or general reputation, but from a single individual, is received upon this subject. Some courts confine this description of evidence to boundaries of parishes and such tracts as are of general and public interest, while others admit it in all controversies, whether pertaining to public or private rights. The English rule confines it to matters of public and general interest, and the same rule is adopted in some of the United States; while in other states the evidence is freely admitted without regard to the nature or character of the tract in dispute, or the parties interested therein. Among the numerous authorities bearing upon this matter may be enumerated, Boardman v. Read, 6 Peters, 341; Buchanan v. Moore, 10 Serg. & Rawle, 281; McDonald v. McCall, 10 Johns. 377; Spear v. Cate, 3 McCord, 227; Wooster v. Butler, 13 Conn. 309; Weems v. Disney, 4 Har. & McH. 158. In this State the rule is, that statements of deceased individuals who from their situation had the means of knowledge and no interest to misrepresent, are admissible. Shepherd v. Thompson, 4 N. H. Rep. 213. The practice under this decision has been, not to limit the evidence to subjects of general interest, but to extend it to all matters of boundary, whether pertaining to public tracts or private rights.

The evidence in regard to the plan found in possession of Gilchrist, was also competent to be considered. Had this plan been produced from among the records of the town-clerk, having been received by him from his predecessor in office, there would probably have been no question made respecting it; for notwithstanding it is without date, yet being ancient, and made by Patten and the records showing that Patten with another was appointed to survey the town into lots, the whole current of authorities sustains its admissibility. Chapman v. Cowlan, 13 East. 10; 1 Phil. Ev. 418; Ib. 481; 4 Esp. 1; 6 Dow. 202; Hewlet v. Larroway, 3 Johns. Ca. 283; 1 Green. Ev. sec. 142.

The reason why it is required that an ancient document shall be produced from the proper depository is, that thereby credit is given to its genuineness. Were it not for its antiquity, and the presumption that consequently arises that evidence of its execution cannot be obtained, it would have to be proved. It is not that any one particular place of deposit can have more virtue in it than another, or make that true which is false, but the fact of its coming from the natural and proper place tends to remove presumptions of fraud and strengthens the belief in its genuineness. It may be false, and so shown, notwithstanding the presumptions in its favor. If found

where it would not properly and naturally be, its absence from the proper place must be satisfactorily accounted for; but that being done and all suspicion against its genuineness removed, we can discover no reason why it may not be read in evidence. The real question which is to affect its consideration with the jury is, whether the instrument offered is genuine, and contains a true statement of what it purports to. In The Bishop of Meath v. Marquis of Winchester, 2 Bing. 183, Tindal, C. J., speaking of ancient documents, holds this language. "It is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit, that the investigation commences whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine." Some authorities hold, that the antiquity of the document is alone sufficient to entitle it to be read, and that the other circumstances only go to its effect in evidence. 2 Both. Ob. App. XVI. sec. 5, p. 149. See also Jackson v. Larroway, Johns. Ca. 283; Doe v. Burdett, 4 Ad. & El. 1.

Judgment on the verdict.

BERTRAM v. WITHERSPOON'S, Admr.

138 Ky. 116. (1910)

HOBSON, J. Carrol Markham died a resident of Warren county on February 22, 1881, the owner of certain real estate. He left surviving him two daughters, Alice Witherspoon, the wife of Thomas Witherspoon, and Sadie Markham, now Sadie Bertram. Mrs. Witherspoon died about the year 1888, leaving surviving her a son Porter Witherspoon. After her death, her husband married a second time, and by his second wife had two sons. He and his second wife died

about 10 years later. Porter Witherspoon died February 4, 1904, and this controversy has arisen between his aunt, Sadie Bertram, and his two half-brothers, the children of his father by his second marriage, as to who inherited from his mother, and she inherited from her father, Carroll Markham.

The case turns purely on a question of fact, and on such matters we give some weight to the judgment of the chancellor, and do not disturb his finding where the evidence is conflicting, and on the whole case the mind is left in doubt. The aunt introduced five or six witnesses, who knew the family, and fixed the age of Porter by reference to the ages of their own children or other circumstances testifying that he was born in April, 1883. On the other hand, the plaintiff introduced several persons, who had equal means of knowing and fixed the birth of the child in about the same way testifying that he was born in April, 1882. The numerical preponderance of the testimony is with Mrs. Bertram, but the following facts support the conclusion of the chancellor: Porter himself said on different occasions that he was born in April, 1882. In April, 1903, he settled with his guardian, and took charge of his property. None of his relatives at that time raised any question that he was not of age. On the contrary, Mrs. Bertram then told the tenant who was living on the land that Porter was of age, and that the tenant should pay the rent to him. In addition to this, the family Bible is produced, which shows that he was born in April, 1882; and, while the handwriting of the entry is not shown to be that of his father, the fact that there was this entry in the family Bible is some evidence, it not appearing who made it, for it clearly appears that it was in the Bible at his father's death, and long before there was any question raised about his age. He was the only child born in the family, and so this was the only birth entered in the Bible. In cases of this sort, where all the parties are dead, the entry in the family Bible may be considered without proof of the handwriting, when it is shown to be an ancient entry, made before there was any motive for putting a false entry in the Bible. The Bible was taken from his father's house after his death, and it then had this entry. Nobody is living now who would reasonably know who made the entry, as Thomas Witherspoon and his two wives are dead, and the two sons by the second marriage were too young to know anything about such matters. A family Bible is the book in which such entries are usually made, and when the Bible is produced with the entry in it when it came from the possession of Thomas Witherspoon, it may properly be considered as evidence. In

addition to this the school census for a number of years is produced, and these all show that Porter was born in April, 1882. The school census is a public record, parents are required to give in the ages of their children. These reports were made during the life of Thomas Witherspoon, and are better evidence now of the date of Porter's birth than the recollection of witnesses as to a date more than 25 years ago. In addition to this we think the facts that Porter himself always understood that April 20, 1882, was the date of his birth, that Mrs. Bertram, herself seems to have so understood when the tenant asked her about it, and that there was no controversy about his age until after his death, are entitled to no little weight.

Judgment affirmed.

UNION CENTRAL LIFE INS. CO. v. POLLARD.

94 Va. 146. (1896)

This was a proceeding by notice on an insurance policy on the life of Augustus M. Broach. The beneficiary in the policy, the plaintiff in the court below, was Dollie E. Pollard, his daughter. There was a verdict and judgment for the plaintiff for the sum of four thousand dollars, the amount of the policy, subject to a credit for two hundred and seven dollars and twelve cents, as of May 1, 1893, being the amount of the last premium due on the policy which had been tendered in due time to the company, but refused by it. The defense relied on was that the assured had fraudulently represented himself as being a year younger than he really was, and that he was diseased and failed to disclose it. On the same day on which the policy in suit was issued the assured made three applications for insurance on his life for his different daughters, in each of which, as well as the application on which the policy in suit was issued, he gave as the date of his birth May 8, 1839. In a written application to the Valley Mutual Life Association of Virginia, dated December 12, 1882, by which he applied for a policy for the benefit of his wife and children, he gave as the date of his birth May 8, 1838. What was called the family bible was introduced to show his age, and in the records of births his name and others appear in the handwriting of a stranger, and the date of his birth is given as May 8, 1838. The bible itself was published some years later but it was shown that it

was the bible kept in the family as the family bible, accessible to all the family, and contained the dates of the births and deaths of the family. Objection was made to the introduction of the foregoing entries, but was overruled, and exception taken by the plaintiff.

BUCHANAN, J. The defendant in making its defense sought to show that one or more of the material statements made by the insured in his application were false and fraudulent. To do this it offered in evidence the family bible of the insured, and read to the jury an entry which tended to prove that he was born on the 8th day of May, 1838, instead of May 8, 1839, as stated in his application for the policy sued on. Although it appeared that the entry read to the jury as to the date of his birth was made by a person who was not a member of his family, it was admissible evidence, and tended to prove the date of the birth of the insured. The admissibility of an entry in a family bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is in the family bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence. The reason why it is admissible, although the handwriting be unknown or made by others than the family, is simply because the bible being in the family, where all have access to it, the presumption is that the entry would not be permitted to remain if the whole family did not adopt it, and thereby give authenticity to it. Monkton v. Attorney General, 11 Eng. Chy. R. at pages 162-3 (Russ & Mylne); Hubbard v. Lees, 1 Law Rep. (Court of Ex.) 255, 258; 1 Taylor on Ev. sec. 650; 1 Greenleaf on Ev. secs. 104, 105.

Reversed on another ground.

ACCOUNT BOOK ENTRIES.[1]

VEITHS v. HAGGE.

8 Iowa 163. (1859)

This was an action upon a promissory note for $1,050, commenced by attachment.

The defendant, in order to prove the accounts against the plaintiff, produced in evidence his books of account, having first introduced the necessary preliminary evidence in verification of said books; and

[1] Hughes on Evidence, p. 104.

also called as a witness one Heinrich Jensen, who testified that he was empoyed as a clerk in the store of defendant, from the first of March, 1855, to the first of March, 1856 and that plaintiff, during that time, was a customer at said store, and was in the habit of borrowing sums of money from defendant, which were charged to him on the said books of account. The bill of exceptions then recites, that the defendant offered no evidence independent of said books, in support of the specific items of the cash charged against the plaintiff in the accounts; and that the plaintiff offered no independent evidence on his part to prove any payments made by him to the defendant, but relied, in order to establish the same, on the credits given to him for such payments, upon the accounts offered in set-off, and the said books of account.

STOCKTON, J. Upon the question of the admissibility of the party's book of entries for the purpose, and the extent to which it is allowable to prove by them the cash items in an account, the rule varies in the different states. In Massachusetts, Maine and New Hampshire, money charges may be proved by them to the extent of $6.66, but not beyond. Union Bank v. Knapp, 3 Pick. 109; Burns v. Fay, 14 id. 12; Prince v. Smith, 4 Mass. 455; Wetherell v. Swan, 32 Maine, 247; Richardson v. Emery, 3 Foster, 220; Bassett v. Spofford, 11 N. H. 169.

In Pennsylvania, the book of original entries, made by the party, and verified by his oath, is competent evidence of goods sold and delivered, and work done, and of the price, but not of money lent or paid. Ducoign v. Schreppel, 1 Yates, 347.

In South Carolina, the book of the party is evidence to prove the delivery of articles sold, or work done, and nothing more. St. Phillip's Church v. White, 2 McMullen, 312.

In Delaware, by statutory regulation, in an action for articles sold and delivered, and other matters properly chargeable in an account, the oath of a plaintiff, together with a book regularly and fairly kept, are declared to be sufficient in all cases to charge a defendant. Halls Revised Laws, 89. But the courts have held that cash is not a matter properly chargeable in account. Smith v. M'Beath, cited in Harrington, 346.

In New York, in Case v. Potter, 8 Johnson, 211, the question of admissibility was not decided; but it was said by the court, that although a shop book might be admitted in a case of a sale and delivery, yet the usage "can never apply to a charge for cash lent, but only to the regular entries of the party in the usual course of his business."

In Vossbing v. Thayer, 12 Johns. 461 the court say: that "books of account are not evidence of money lent, because such transactions are not, in the usual course of business, matters of book account."

In Illinois, the rule in New York has been adopted, and it is held, that upon the necessary and usual preliminary proof being made, in case of open account, composed of many items, the plaintiff's book of accounts is admissible; but that this does not apply to an action for money lent, as that is not usually the subject of a charge in account—a note being generally taken. Boyer v. Sweet, 3 Scam. 120.

We think the general rule is clearly established by these authorities, that a charge for "money paid," or "money lent," cannot be proved by a party's book of accounts; that such transactions are not usually the subject of a charge in account; and that charges of that nature are not such as are made in the ordinary course of business by one party against another.

It may be safely affirmed that the general rule in the business transactions of men is, that the person lending or paying money usually takes a note or receipt. As is said, however, by Hitchcock, J., in Crane v. Sperar, 8 Ham. 494 an individual might be engaged in a business that would seem to justify such charges—as where one's ordinary business may be said to consist in receiving money on deposit and paying it out for others. When such fact is shown, the book may be proper evidence of the payment of money. This would not, however, apply to the case of a party engaged in the mere business of keeping a retail store, whose customers purchase goods of him on credit, which are charged to them in a running account. Loaning, or paying out money to his customers, is no part of such a person's business. They would not ordinarily expect to find themselves charged in their accounts with sums of money lent or paid.

Judgment reversed.

YOUNG v. JONES.

8 Iowa 220. (1859)

The plaintiff sued the defendant, claiming the sum of $164.50, and averring that at the special instance and request of defendant, he worked for him ninety-four days, and defendant promised to pay

him therefor $1.75 per day, which he now refuses, &c. The defendant answered, denying that the plaintiff worked ninety-four days, as alleged; denying that he owed the plaintiff $164.50 as alleged, or any part thereof; and denying that he undertook and promised to pay plaintiff $1.75 per day for his work. There was also a plea of payment and of set-off.

The defendant proposed to prove his set-off by his books of account and in the language of the bill of exceptions, "in the regular manner, as provided by law, qualified the same, and that each and all the items in defendant's set-off were charged in defendant's book of accounts." Thereupon the book was permitted to go to the jury as evidence. The set-off contained items of money paid to plaintiff, amounting to thirty-five dollars—one item of twenty dollars and three of five dollars each. The court charged the jury, that the "items of the set-off for money paid, could not be proved by the book of accounts; and that the book was not, of itself, evidence of the fact of money paid to plaintiff, as charged therein, and contained in defendant's set-off. To this ruling of the court, the defendant excepted.

STOCKTON, J. Books of account are competent evidence, when the charges they contain are made in the ordinary course of business. This fact is to be determined by the jury, from the charges themselves, and from the rules of law applicable to the business transactions of men. One of these rules is, that the loan, or payment of money, is not ordinarily the subject of a charge in book account; and that the charge not being such as is made in the ordinary course of business, by one party against another, cannot be proved by the account book. To render the account book competent to prove the payment of money, the party offering it must show that he is engaged in a business to justify such charges; as, to illustrate, in the business of banking, or of receiving money on deposit, and paying it out for others. If the payment of loans of money paid, were made in the ordinary course of business, he may justly claim the right to prove them by his books, but not otherwise.

The rule that the books are inadmissible to prove the loan or payment of money, has been so far departed from in some of the New England states, as to allow the proof by the book of original entries, of the payment of money not exceeding forty shillings, or six dollars and sixty-six cents ($6.66). Bassett v. Spofford, 11 N. H. 169; Burns v. Fay, 14 Pick. 12; Union Bank v. Knapp, 3 id. 109; Prince v. Smith, 4 Mass. 455; Wetherell v. Swan, 32 Me. 247; Richardson v. Emery, 3 Foster, 220.

The exception may have some show of necessity, if not of principle, to support it. Our statute, however, has made no such distinction, as that small sums of money may be proved by a party's books of account, but that large sums shall not be so proved. If allowed at all, the privilege must be strictly guarded, and only admitted in cases where the jury may be of opinion, that the party is without any other proof; and that there has been such a course of continuous dealing between the parties, as that small sums of money passed between them in the ordinary course of business, and became the legitimate subject of a charge in book account, by one against the other. If they should so judge, we think they should be at liberty to allow the same.

Judgment reversed on another ground.

CUMMINGS v. NICHOLS.

13 N. H. 420. (1843)

Assumpsit upon an account annexed to the writ. The defendant had instituted an action against the plaintiff, founded on his account, and by agreement of the parties both actions were submitted to the jury at the same time.

Upon the trial, the plaintiff offered his book of accounts, with his oath, in support of the charges in the account.

The defendant objected to the admission of the book as evidence to the jury, but the objection was overruled.

PARKER, J. There is no particular form in which the book of a party must be kept, in order to its admission as evidence, in support of his account. But it must be kept in such a mode as to show, of itself, a charge against the adverse party, and the nature of that charge, so that the book, in connection with the party's oath that the book is his original book of entries, that the charges are in his handwriting, that they were made at the time they purport to have been made, and at or near the times of the delivery of the articles, or the performance of the services, will show the nature of the claim, without further evidence from the party to interpret the meaning of arbitrary characters, the signification of which is known only to himself. It may be in such characters as are in common use by persons of a particular trade or profession, and which would not readily be under-

stood by persons not conversant with the subject matter; and in such case, evidence of other persons may be admitted, to explain the meaning usually attached to characters of that description. But in ordinary cases, the suppletory evidence of the party, in support of his book, goes no further than to the particulars above specified. 3 N. H. Rep. 157, Eastman v. Moulton.

To be admissible, the entries should be made at or near the time of the transaction, and the oath of the party must verify that fact. No particular limit is fixed beyond which the entry cannot be made. The court must judge whether the circumstances of the case bring it within the rule. But it is clear that the entries must not be memoranda made from the memory of things which have long since passed.

The entries must have been made at the time they purport to have been made. This implies that there must be dates, so far, at least, that the court may see that the case comes within the rule. But it is not necessary that the precise day of the month should be affixed to the charge in all cases. To require this would exclude the books of many individuals. The book has been admitted when only the month has been specified, it appearing to be regular in other respects.

The charges must be specific and particular; but in this respect some latitude is allowed, depending upon the nature of the case. See 11 N. H. 167, Bassett v. Spofford. In a charge for work and labor, continuing from day to day, for several days, it is not necessary to set down a charge for each day by itself. But a brick-layer's charge for "190 days work," and a physician's charge of "13 dollars for medicine and attendance in curing the hooping-cough" have been rejected as too general and indefinite. It has been said that this is a matter which must reside very much in the discretion of the judge, to be exercised according to the nature of the subject, and its susceptibility of being precisely charged. See the cases collected. 2 Cowen & Hill's Phil. Ev. 699; Greenl. Ev. 141. If the charge be for labor, and it be a continuing service for three or four days, there seems to be no very cogent reason why it may not form the subject matter of a single charge. On the other hand, if it continue for months, there is no reason, if the party relies upon his book, why he should not make his charges from week to week, or in other limited terms.

Upon the principles thus stated, it is apparent that some of the charges in the plaintiff's account are not such as can be substantiated by his book and suppletory oath. Not having the original book before us, we have merely laid down general rules applicable to the case. Something may depend upon its appearance.

The rule does not extend so far as to authorize the use of his book, by a party, to curtail or defend the claims of other parties against him.

It is not a sufficient objection to the introduction of the book and oath as evidence, that the subject-matter of the entry may have been done, delivered, or received, under a special contract. Such entries are proof of the use of anything hired and returned, respecting which there is often a special contract for time and price.

New trial granted on another ground.

CHATEAUGAY IRON CO. v. BLAKE.

187 U. S. 476. (1891)

BREWER, J. After stating the case, delivered the opinion of the court.

The question in this case is whether or not the plaintiff fully performed his contract of March 26, 1886.

The first matter we notice is the alleged error in the testimony of Charles S. Brown, who from certain account books which he presented, was permitted to testify as to the actual working of the plant between October 18 and November 7, giving in that testimony the actual hours the plant was working, the number of tons crushed, the hours of delay, and the causes therefor. This witness was sent by Mr. Blake to superintend the erection of the plant, to watch its workings when completed and to make any needed repairs, improvements or changes. At his suggestion, after the plant commenced work, the defendant's superintendent directed the foremen of the mill to keep these books. The foremen, of whom there were four, generally made the entries on the books, though sometimes Brown did the writing at their dictation. The entries were made daily; at least, that was the intention and the general practice. The amount of ore crushed, as disclosed by these books, corresponded within a few tons with the amount testified to by the officers of the defendant company. Brown, himself, was present at the mill most of the time during the day, and had a general knowledge of the accuracy of these entries so far as respects the work during that time. We think the testimony was competent. The books were kept by the direction of the defendant's superintendent, and the entries made by its foremen. They were

intended to be, and in fact generally were, contemporaneous with the matters stated; and their substantial accuracy is corroborated by the personal knowledge of the witness, and the near coincidence of the general result with that vouched for by the defendant. They may not have been account books of the defendant, in the technical sense of the term, such as are generally admissible against a party, but they were memoranda made under the direction of the defendant for the purpose of preserving a record of certain facts, and under such circumstances as are worthy of a measure of credence as against it.

Affirmed.

ROBINSON v. SMITH.

111 Mo. 205. (1892)

MCFARLANE, J. Plaintiffs are bankers and sued the defendant before a justice of the peace for an alleged overdraft of $50.

The case was taken by appeal to the Circuit Court when upon a trial the defendant recovered judgment, and plaintiffs appealed to the Kansas City Court of Appeals.

Upon a hearing in that court, Smith, P. J., wrote an opinion, reversing the judgment of the Circuit Court, and the appeal was certified to this court, the opinion being deemed in conflict with decisions of the St. Louis Court of Appeals.

At the trial of the case plaintiffs offered to introduce in evidence their ledger, cash book and balance book kept in the transaction of their business as bankers, and showing the transaction with the defendant, and offered to prove that they were accurately kept, and that the entries were made and the books written up each day from the checks of the customers and tickets of the teller, and that the books were balanced each day to verify their accuracy. These offers were refused and the books excluded. This ruling of the court is the only error assigned here.

Judge Smith in his opinion says: "Upon the long and well-recognized rule that the book entries, made by a party himself, or by his clerk, in the usual course of his business, being contemporaneous with the fact, and part of the *res gestae*, are admissible in evidence, I think the offer of evidence made by the plaintiffs should not have been

rejected." Since this opinion the whole question has been carefully considered by this court, the decisions in this state reviewed, and in an elaborate opinion by Black, J., the same conclusion was reached as that arrived at by the Court of Appeals. Anchor Milling Co. v. Walsh, 108 Mo. 277.

The court committed error in refusing to admit in evidence the books offered. Judgment of Kansas City Court of Appeals affirmed.

All concur.

KEITH et al. v. KIBBE.

10 Cush. (Mass.) 35. (1852)

Assumpsit for the price of a quantity of timber sold by the plaintiffs to the defendant. The trial was before Mellen, J. in the court of common pleas and the defendant admitted the delivery by the plaintiffs of the timber sued for, and that it was used in a dwelling-house erecting for him, but contended that the same was sold to one Rollins, a contractor, who had agreed to furnish the materials and build said house. The plaintiffs called their clerk, who produced their books of account, and swore to the entries therein made by himself, charging said timber to the defendant. The defendant objected to these entries as incompetent evidence of the fact to whom the credit was originally given, but the presiding judge admitted the evidence. The verdict was for the plaintiffs, and the defendant excepted. The case was argued in this court, as of the September term, 1851.

BY THE COURT. The day-book of the plaintiffs was not competent for the purpose for which it was allowed to be introduced. The controversy was not as to the items or time of delivery of the timber. It was conceded that the amount was furnished by the plaintiffs, and was used in building the defendant.s house. But the defendant denied that he was the purchaser, and insisted that the same was sold by the plaintiffs to one Rollins, the contractor for building the house. It was a mere question as to the party who was the debtor to the plaintiffs for these articles. And in this aspect of the question the plaintiffs could not properly be allowed to introduce their own charges for the timber made against the defendant as the debtor, to aid in sustaining their case. The case of Ball v. Gates, 12 Met. 491, cited by the plaintiffs, differs materially from the present, as there was

other evidence relied upon to charge the defendant as the debtor, and the book was offered to show merely the items delivered.

Exceptions sustained; verdict set aside.

ANCHOR MILLING CO. v. WALSH.

108 Mo. 277. (1891)

BLACK, J. This was an action to recover over payments alleged to have been made by the plaintiff to the defendant. A trial was had before a jury, which resulted in a verdict and judgment for the defendant. The St. Louis Court of Appeals, to which the cause was appealed, reversed the judgment and remanded the cause for error in the instructions. That court, however, sustained the ruling of the trial court in excluding a shipping book offered in evidence by the plaintiff. On this question one of the judges deemed the opinion contrary to Smith v. Beattie, 57 Mo. 281, and for this reason the cause was then certified to this court.

Defendant had a contract with plaintiff whereby he was to receive a specified price for hauling wheat and flour to the mill and a specified price per barrel and sack for hauling flour and other mill products from the mill to different points in St. Louis and East St. Louis. Books were kept at the plaintiff's warehouse, which was about a block distant from the mill, showing the wheat and flour received and shipments made, and these books disclosed the amount of hauling done by the defendant. A Mr. Timmons, who was one of the plaintiff's clerks at the warehouse, made up a statement on a slip of paper at the end of each week, showing the amount due the defendant. The plaintiff's cashier at the mill paid the defendant the amount due as disclosed by these statements. The business proceeded in this way from the first to the latter part of 1883, when the plaintiff caused the books to be examined and concluded that payments had been made to defendant largely in excess of what he had earned. Timmons and defendant left the employ of the plaintiff, and a criminal prosecution and this suit followed.

The shipping book, offered in evidence by the plaintiff and excluded by the court, was made up and kept in the following manner: Orders were sent from the office at the mill to the warehouse to send desig-

nated amounts of flour, etc., to designated places. The orders were then entered in the shipping book by Timmons, the shipping clerk or by Mr. Warren, who had a general supervision over all the business at the warehouse. The orders were then copied into a small handbook for the use of the foreman, who delivered the articles to defendant's teamsters, made a note of the fact and returned the book to the clerk, who made entries on the shipping book, showing, among other things, the delivery of the article to the defendant. Mr. Warren says he always compared the orders with the book when made up, and then returned the orders to the mill office; that he knew the flour and other mill products were delivered to defendant from the information received from the small book, and some cases from personal observation. These returned orders were lost or destroyed. Timmons, the shipping clerk, was not called as a witness. With this preliminary proof the plaintiff offered in evidence the shipping book, but the court excluded it.

Since a party may testify in his own favor, it must be conceded that he, as well as his clerk or bookkeeper, may refresh his memory from entries made by him or under his eye, and then testify as to the fact with his memory thus refreshed. Now in cases of an account composed of many items, all this means nothing more than reading the book in evidence. This we all know from daily experience in the trial courts. It is out of all reason to say that a merchant or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt. Account books are admitted in evidence for the person by whom they are kept when the entries are made at the time or nearly so of doing the principal fact, because entries made under such circumstances constitute a part of the *res gestae*. An entry thus made is more than a mere declaration of the party. It is a verbal act following the principal fact in the orderly conduct of business. Such is certainly the custom and course of business at the present day. We, therefore, conclude that an account book of original entries, fair on its face, and shown to have been kept in its usual course of business, is evidence, even in favor of the party by whom they are kept. It follows that the shipping book should have been received in evidence.

As the Court of Appeals reversed the judgment and remanded the cause for other errors, the judgment of that court is affirmed. BARCLAY, J., absent, the other judges concur.

RICHARDSON v. EMERY et al.

23 Vt. 220. (1851)

Assumpsit on an account annexed to the writ.

The plaintiff testified that he was engaged in buying lots of wood and selling them out again; that in some of this business he was in partnership with Mr. Sawyer, and that he did a small business on his own account; that he kept different books, like that produced, for different lots of wood; that this book contained an account of the wood sold the defendants, and of the Colt lot, bought by him and Sawyer; that he kept a separate memorandum book for each lot of wood; that these different books taken together would contain a history of his business. He offered to produce all these books, and also a book into which he said these accounts were carried in August, 1848. There was nothing in the book that showed of whom the plaintiff had the wood charged to the defendants, or to what lot it belonged.

The jury found a verdict for the defendant, Emery, which the plaintiff moved to set aside for the ruling of the court rejecting his book.

GILCHRIST, C. J. The ruling of the court, in this case, rejecting the book was correct. There is no principle on which such extremely loose papers as those offered by the plaintiff are admissible in evidence, as a book of accounts. They do not possess that intrinsic evidence of their truth, without which the admission of account books is extremely dangerous to the cause of justice.

In the first place, the charges in the hand-writing of the party must appear in such a state that they may be presumed to have been his daily minutes of his transactions and business. Eastman v. Moulton, 3 N. H. 156. The papers offered to substantiate this claim are confessedly not such minutes. The plaintiff was engaged in buying and selling lots of wood, and he kept different books for the different lots. He did not keep one book of original entries on which his daily charges were made, so as to afford some security against interpolations, but the matters relating to each transaction were separately recorded. It would be much easier to manufacture a book containing the plaintiff's statement of a single transaction, than a regular account book containing the minutes of his business from day to day.

The charges, with the single exception of that against the defendants, purport to be only for money received and for money paid. This

does not accord with our experience of the nature of daily transactions between man and man. Ordinarily business does not consist so exclusively of such subjects, and this is a matter proper to be considered in connection with others, in determining whether the book can be considered a daily record of business transactions. We cannot presume that the business of the plaintiff was so entirely of this character.

Judgment for the defendant.

CORR v. SELLERS.

100 Pa. St. 169. (1882)

Assumpsit, by William Sellers & Co. against Bernard Corr to recover the price of certain repairs to a brick machine.

On the trial before Thayer, P. J., plaintiffs called their sales clerk, by whom their sales book or book of original entry was identified wherein was contained the following charge:

"B. Corr, Dr."

"July 13th, 1880. To repairing brick machine, $1,932.76."

Plaintiffs then offered the book in evidence. Objected to by the defendant because the charge was a lumping charge, and did not particularize what the repairing consisted of, and because it was impossible for the defendant to know from said charge what amount of material had been furnished or work or labor done in making said repairs, or whether the price was a reasonable and proper charge. Objection overruled. Evidence admitted. Exception.

Verdict and judgment for the plaintiffs, whereupon the defendant took this writ, assigning for error the admission in evidence of the above book entry.

MERCUR, J. The specifications of error present a single question. That is, whether the book of original entries was admissible for the purpose offered? It was admitted under objection, to prove the following item:

"B. Corr, Dr."

"July 13th 1880. To repairing brick machine $1,932.76."

The first objection made to its admission was "because it was a lumping charge and did not particularize what the repairing consisted of, and it was impossible for the defendant to know from the said charge,

what amount of materials had been furnished or work or labor done in making the repairs, or whether the price was a reasonable and proper charge.

The general rule is well established, that books of original entries, properly proved, are evidence of work and labor performed, and of goods sold and delivered. Yet to this general rule several exceptions have been recognized. Among them that the invoice-book of an agent is not evidence of the sale and delivery of goods: Cooper v. Morrel, 4 Yeates 341. Nor of goods to be delivered at a future day: Rheem v. Snodgrass, 2 Grant 379. Nor of work done, in an action for part performance under a special contract: Alexander v. Hoffman, 5 W. & S. 382; Eshleman v. Harnish, 26 P. F. Smith, 97. Nor of the sale of a horse not in the course of the parties' business: Shoemaker v. Kellog, 1 Jones 310. Books of original entry were formerly received in evidence from necessity. Where the transaction from its nature admits of more satisfactory proof, they should not be received. Id. Now, since the parties are competent witnesses in their own behalf, great care should be taken that there be no enlargement of the rule.

In several of the states by statute, books are competent evidence to prove an account not exceeding a sum specified. We have no statute on the subject, and so far as I am aware, this court has never stated any specific sum to be in excess of the amount which may thus be proved. This may arise from the fact that a book has never been offered in evidence here to prove an item of very large amount. We will not now designate the maximum sum for which a book may be received in evidence. We think, however, there must be some limit. Much more depends on the nature and character of the subject-matter of the item, and on the evidence outside of the book, which naturally exists to prove the item. In Leighton v. Manson, 14 Maine, 208, the book of original entries was held incompetent to prove an account of two charges for beef, bearing date the same day, one for 355 pounds, the other for 360 pounds. The exclusion appears to have been sustained by reason of the articles having been of such bulk and weight that they were not delivered without assistance, and therefore, better evidence than the book was attainable. In Thomas v. Doyott, 1 Nott & McCord, 186, it was declared that this species of evidence ought not to be allowed, where it is in the power of the party to produce other evidence. Hence, in Pelzer v. Cranston, 2 McCord, 328, it was held that a school-master's books, though regularly kept, were not evidence to prove his account, as he

must have had many witnesses at command, and the evidence of his books was, therefore, not necessary.

The rejection of the book to prove the sale of the horse, in Shoemaker v. Kellog, *supra*, appears to have been ruled chiefly on the ground that from the nature of the transaction, there must have existed other and better evidence of the sale.

The charges must be reasonably specific and particular. This is the more necessary, inasmuch, as when received, the books are *prima facie* evidence, both of the item charged, and the price and value carried out: Ducoign v. Schreppel, 1 Yeates 347; Baumgardner v. Burnham, 12 Morris 88. A general charge for work and labor of a mechanic, without any specification but that of time cannot be supported by evidence of an entry on the book. Therefore, a bricklayer's charge of "190 days work" was rejected: Lynch's Adm'rs v. Petriel Nott & McCord 130. So a charge of "13 dollars for medicine and attendance on one of the general's daughters, in curing the whooping cough," was rejected as too indefinite: Hughes v. Hampton, 2 Const. Rep. (O. S.) 745. An item in an account of "seven gold watches, $308," was held insufficient: Bustin v. Rogers, 11 Cush. 346.

In the present case the objection was special and specific. It was to the lumping form of the charge. There was nothing therein to indicate the number of days, weeks or months of labor, claimed to have been performed on the machine, nor the price charged for any of them; nothing to show the kind, quantity, or value of the materials furnished, nor the price charged therefor. No item is given whereby the value of anything which entered into the repairs can be ascertained, and its correctness be tested. What share or proportion of the aggregate sum charged is for work or what for materials if any, is not stated. A lumping charge of nearly two thousand dollars was thrown into the jury box, and the opposite party, without proof and without information as to the items of which it was composed, required to defend against it.

We think the learned judge erred in admitting his book entry as evidence to charge the plaintiff in error with the amount thereof. The error was not cured by the character of the evidence afterward given; something more specific is necessary to prove the claim.

Judgment reversed and a venire facias de novo awarded.

WELLS v. HAYS.

93 S. C. 167. (1912)

HYDRICK, J. This action was brought to recover the balance due on a due bill for $1,138.53, dated March 29, 1904, and given to plaintiff by R. M. Hays & Brother, a mercantile firm composed of R. M. and A. G. Hays, both of whom died before the commencement of the action. The action was brought against defendant alone, because she assumed payment of the due bill.

Plaintiff admits one payment of $200.00 which was credited on the due bill. Defendant pleads four others, which, with that admitted, aggregate $964.67, leaving a balance of only $319.00 for which amount the jury found a verdict for plaintiff. From the judgment entered on the verdict, the plaintiff appealed.

Three of the alleged payments, including the one admitted by plaintiff, were checks of R. M. Hays & Brother, payable to the order of J. W. Wells the husband of the plaintiff and endorsed by him. There was nothing on the checks to indicate for what purpose they were given; but there was a memorandum on the stub of each in the check book, and also in the cash book of R. M. Hays & Brother, to the effect that they were intended as payments to Mrs. Wells. One of the checks was payable to the order of W. J. Snead Lumber Company, and there was a similar memorandum on the check stub and in the cash book. One of the payments alleged was an item of $150.00 charged on the cash book to Mrs. Wells as cash paid to her. In the ledger account of plaintiff on the firm books, she is credited with $1,138.53, as of the date of the due bill, and debited with the several amounts claimed by the defendant as payments thereon, at the respective dates thereof. These amounts were carried on the ledger by the bookkeeper from the check stubs and the cash book.

The question upon which the appeal must turn is: Did the court err in admitting the books of account of R. M. Hays & Brother and their check book stubs, containing the memoranda thereon, as evidence of the alleged payments to the plaintiff. The decisions of this court clearly answer that question in the affirmative.

From time immemorial, the books of merchants, shopkeepers, tradesmen, and others whose business or occupation necessitates the keeping of books, have been admitted in the courts of this State to prove accounts for goods sold and delivered, services rendered, work and labor done, and materials furnished; but this court has uniformly

held that books of account or private memoranda are inadmissible for the purpose of proving special contracts, such as are not shown by or to be inferred from the entries alone, regularly and properly made in the usual course of business in books of one of the classes above mentioned.

As a rule, the authorities are against the admission of books of account as evidence to prove such cash transactions as money loaned or payments made on notes, bonds or other obligations. Williams v. Gregg, 2 Strob. Eq. 315; Wigmore, sec. 1539; 9 A. & Enc. L. (2nd) 930-1; Lewis v. England, 2 L. R. A. (N. S.) 401, and note. To this general rule, some authorities make an exception of bank books kept in the usual course of business, and account books generally where the cash items appear in the general course of accounts as part of the ordinary transactions between the parties. Lever v. Lever, 2 Hill Ch. 158; Sinclair v. Price, Ib. 160. There may be other exceptions to the rule; but as this case does not fall within any of them, we express no opinion as to what exceptions may be made to the general rule, or what circumstances of necessity would warrant the making of them. The point decided does not conflict with the well settled rule that such entries or memoranda may be referred to by the person who made them for the purpose of refreshing his memory, and thereby enabling him to testify to the transactions so recorded, if he is otherwise competent.

Reversed.

PRATT v. WHITE.

132 Mass. 477. (1882)

Contract upon an account annexed for goods sold and delivered to the defendant by the plaintiff's intestate. Answer, a general denial.

At the trial in the Superior Court, before Putnam, J., the plaintiff offered in evidence the book of original entries kept by his intestate, with his own oath and that of the intestate's clerk. The defendant objected to its admissibility, on the ground that no measure, weight or quantity was given in connection with the several items charged. The judge ruled that this did not make the book incompetent evidence to be submitted to the jury and admitted it.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions of which the book was made a part.

DEVENS, J. The admission of the books of account of a party to prove items of work done and goods delivered, when supported by his own oath, or, if he is deceased, that of his administrator or executor, has long been permitted in this State, and under various restrictions, some created by statute, in all the States of the Union. It has been sanctioned as an exception to the general rule of law as it formerly existed, that a party should not be a witness in his own case, and from supposed necessity, in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses.

It is for the court to decide upon the admissibility of the book offered, although the weight to be given to it afterwards must be largely a question for the jury in connection with its appearance, the manner in which it is kept, and the other evidence in the case. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been the record of the daily business of the party, made for the purpose of establishing a charge against another. Necessarily, regard is to be had to the education of the party, his methods and knowledge of business, &c., in deciding this question. Cogswell v. Dolliver, 2 Mass. 217. Prince v. Smith, 4 Mass. 454.

The decision of the court to admit the book is final and conclusive, unless from its character, or from that which was sought to be proved by it, it could not have been admitted even if it met those tests. Although somewhat irregularly made part of the exceptions to be examined by the court, the book has not been produced by the defendant for our inspection. It appears that measure, weight and quantity were not given in connection with the items of goods charged, but for this reason we are not prepared to say that it was inadmissible. If the book contain the record of the party, daily transactions made for the purpose of a charge, it may be admitted, even if deficient in many respects. It does not follow that, before a plaintiff can fairly ask a verdict, he may not be compelled to supply deficiencies in the evidence his book affords. This bill of exceptions does not show that other evidence was not introduced.

A time book which has only the name of the party and marks under particular dates has been admitted. Mathes v. Robinson, 8 Met. 269. Upon the same principle, marks on a shingle or upon a notched stick have been admitted. Kendall v. Field, 14 Maine, 30. 1 Greenl. Ev.

secs. 118, 119. Yet, without additional evidence, these would afford but incomplete proof of a claim. In Hooper v. Taylor, 39 Maine, 224, a book similar to the one here in question in omitting the weight and quantity of articles was admitted with but little discussion.

There would seem to be no reason why a delivery of specific articles might not be shown by a book of accounts, even if more evidence were needed to show the amount which the plaintiff was entitled to recover. It is easy to imagine many facts in connection with which such charges might be very important. We have no reason to suppose more weight was given to them than that to which they were fairly entitled, and we must presume that the book was submitted to the jury under all proper instructions.

Exceptions overruled.

SMITH v. RENTZ.

131 N. Y. 169. (1892)

ANDREWS, J. The action was brought to recover moneys advanced to and paid out by the plaintiff's testator for the defendant. The complaint alleges that from 1882 to 1887 the testator was the banker and general business agent for the defendant, and that during said years the defendant from time to time deposited moneys with the testator and the latter, as requested by the defendant, from her funds in his hands, and when these were insufficient, from his own, paid her different sums in cash, and also paid taxes and tradesmen's bills for which she was liable, and that there was a balance due the testator on account of such payment of $3,744.75, which the plaintiff claimed to recover. The answer contained a general denial and interposed special defenses. On the trial the plaintiff offered in evidence the ledger kept by the testator containing the items of the alleged account. It was admitted against the objection of the defendant. Evidence was given on the part of the plaintiff independently of the ledger, tending to establish many of the items of the account, but a considerable number of the items for which recovery was had are supported by the ledger alone. If the ledger was improperly admitted in evidence the judgment must be reversed.

The production of books and papers on notice is the voluntary act of the party. If he refuses, it may, as is claimed, authorize the other

party to give secondary evidence of their contents, when the party having possession cannot then answer by producing them. But if they contain facts favorable to the other side, they ought to be disclosed, and if production is refused, the party refusing may justly incur the danger of having secondary proof given of their contents.

The claim is also made that the books were competent as original evidence of the entries, under the rule making books of account in certain cases evidence in favor of the party keeping them. We think there is no foundation for this contention. The rule which prevails in this state (adopted, it is said, from the law of Holland), that the books of a tradesman, or other person engaged in business, containing items of account, kept in the ordinary course of book accounts, are admissible in favor of the person keeping them, against the party against whom the charges are made after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions in this state and has been maintained by the courts with general uniformity. (Vosburgh v. Thayer, 12 Johns. 461.) It stands upon clear reason. The rule admitting account-books of a party in his own favor in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity and was intended for cases of small traders who kept no clerks and was confined to transaction in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property, or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate.

But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes, or writing, or vouchers, in the hands of the party paying or advancing the money. Moreover, entries of cash transactions may be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold or delivered, or of services rendered. It would be unwise to extend the operation of the rule admitting a party's books in evidence, beyond its present limits, as would be the case, we think, if the books containing cash dealings were held to be competent. Parties are now competent witnesses in their own behalf. A resort to books of account is thereby rendered unnecessary in the majority of cases.

We think the ledger was erroneously admitted in evidence, and

the judgment below should, therefore, be reversed and a new trial ordered.

SMITH v. SMITH.

163 N. Y. 168 (1900)

GRAY, J. The plaintiff sought to recover a balance due for coal sold and delivered by him to the defendant. He recovered judgment, upon a trial before a referee, and that judgment has been unanimously affirmed by the Appellate Division. Upon his appeal to this court, the defendant assigns as error a ruling of the referee, under which the plaintiff's books of account were admitted in evidence.

Upon the trial, the plaintiff testified to having had business transactions with the defendant, in the sale of coal to him, for some time past; that his books of account contained a correct statement of the coal sold and delivered within the dates in question and that he, personally, delivered nearly all the coal covered by the account. He testified that his wife kept his books and made the entries therein from memoranda furnished by him, as made after the delivery of the coal. She, also, testified to making the entries in that manner and that they were correctly made. There was evidence on his part, also, to the effect that a copy of the account in the books had been acknowledged by the defendant, with an offer to settle upon some rectification being made. A witness for the plaintiff testified that he had settled with him by his books for eight or ten years and always had found the books correct. Being cross-examined as to that, he said: "I knew the accounts were correct simply because I had confidence in him and paid what he asked. That is all the reason I had for saying they were correct because I had confidence in him. I relied on his honesty and not on my recollection as to the amount of coal I ordered." Another witness testified for the plaintiff that he was a bookkeeper for a firm that purchased coal from the plaintiff on credit and that he had "settled with him according to his books and according to our own four or five times," and "always found them to be correct."

Upon this evidence the books of account were offered by the plaintiff and the objection to their admission was placed "on the ground that they are incompetent; a proper foundation not having been laid

for their being admitted as evidence." The objection was overruled and the defendant excepted. The question is thus presented whether, in the evidence which preceded, a foundation had been laid for the admission of the books according to the requirements of a rule of evidence which should be regarded as established since its formulation in the case of Vosburgh v. Thayer (12 Johns. 461). It was held in that case that books of account ought not to be admitted in evidence, "unless a foundaion is first laid for their admission, by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him." The rule, as thus laid down, has been since accepted as correct. (Matter of McGoldrick v. Traphagen, 88 N. Y. 334; Tomlinson v. Borst, 30 Barb. 42; Dooley v. Moan, 57 Hun 535.) Under these restrictions account books become evidence for the consideration of the tribunal, with which the determination of the issues rests. As evidence, which is manufactured by the party, they should be received with caution; but that is an objection which goes to the weight of the evidence and not to its admissibility, which is to be determined solely with reference to the foundation which has been laid for it.

Their admission in evidence is, of course, not authoritative as to their contents; for the conclusion as to their credit will depend upon their appearance, the manner of their keeping and the character of him who offers them. Although the rule under discussion was established at a time when parties to an action were not allowed to be witnesses, the subsequent legislation, which removed that disqualification and authorized parties to testify in their own behalf, has not deprived them of the right to introduce their books of account in evidence. (Tomlinson v. Borst, *supra;* Stroud v. Tilton, 3 Keyes 139.) The rule may, still, be an important one in the administration of justice in cases where the party kept no clerk able to testify to the truth of the entries in his books and where, unless they are admitted, great inconvenience and a denial of justice may follow.

The conditions precedent to the admissibility of the plaintiff's books of account were sufficiently complied with, within the requirements of the rule in Vosburgh's case. The plaintiff had sworn that he personally delivered nearly all the coal charged and that the books which were produced contained his accounts. That he had no clerk was manifest from his testimony. In fact, the appellant does not claim that the plaintiff did have a clerk and of course, the plaintiff's wife

cannot be claimed to be a clerk, within the meaning of the rule. The clerk so intended means one who had something to do with him, and had knowledge generally of the business of his employer and would be enabled to testify upon the subject of the goods sold. (Matter of McGoldrick v. Traphagen, *supra.*)

The plaintiff had affirmatively shown, not only that his wife kept books for him but that it was he who either delivered the coal or superintended its delivery. The evidence was sufficient to negative the idea that he kept a clerk who could testify, by reason of his employment, to the correctness of the account of goods sold and delivered. The remaining requirement, that proof should be made that the plaintiff kept fair and honest books, was sufficiently met in the evidence of the two witnesses, which has been mentioned. The evidence went to establish, not only the character of the plaintiff for honesty, but that in a course of business extending over several years the witnesses had always found his books to be correct. In the one case, the witness paid his bills relying upon the plaintiff's honesty and not upon his recollection as to the amount of coal ordered; in the other case, the witness had settled the plaintiff's bill against his employers according to his books and according to their own books, and had always found the plaintiff's books to be correct. Such evidence should be, and is quite sufficient to discharge the burden resting upon the plaintiff with respect to that item of the proof required by the rule.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, LANDON and WERNER, JJ., concur; CULLEN, J. not sitting.

Judgment affirmed.

RILEY v. BOEHM.

167 Mass. 183. (1896)

Contract, for money had and received. Trial in the Superior Court, before Bishop, J., who allowed a bill of exceptions, in substance as follows:

In April, 1894, the plaintiff, who was a retail liquor dealer in Fall River, borrowed $400 from the defendant, and gave therefor his promissory note payable three months after date at the B. M. C.

Durfee Safe Deposit and Trust Company. The note was discounted by the defendant at the First National Bank and at its maturity, July 23, 1894, was paid at the B. M. C. Durfee Safe Deposit and Trust Company, where the plaintiff had a deposit, by charging it up to the plaintiff's account. The two banks did business in the same rooms and over the same counters, in Fall River.

The plaintiff testified that on July 18, 1894, a few days before the note matured, he gave the defendant $400 in cash to pay the note, which was then, as both knew, in the bank; that the defendant agreed to take the note out of the bank; that at the same time he gave the defendant a check for $735 as full payment for liquors sold to date; that the defendant did not take up the note; and that the plaintiff took a receipt for the $735 but not for the $400. This action was brought to recover the latter sum.

MORTON, J. The mere fact that an entry in a book is made contemporaneously with the transaction which it purports to record does not of itself entitle it to admission as a piece of substantive evidence. It must also appear to have been made in the regular course of business, under such circumstances as to import its trustworthiness. Donovan v. Boston & Maine Railroad, 158 Mass. 450.

It is for the presiding justice to say, in the first instance, whether the record is of such a character, and his decision will not be interfered with unless clearly wrong. Cogswell v. Dolliver, 2 Mass. 217, 222. Hawks v. Charlemont, 110 Mass. 110. Commonwealth v. Coe, 115 Mass. 481, 504, 505. Commonwealth v. Morgan, 159, 159 Mass. 375. 1 Greenl. Ev. sec. 118, note 1. In the present case the entry which was relied on was contained in a small book, such as is usually carried in a vest or side pocket, and was used for making memoranda in regard to any matter which for any reason the defendant desired to note. We cannot say that the court was not justified in holding that the character of the book gave it no standing. Moreover, the book was offered, not as containing an entry relating to the cash in question, but as showing from the absence of an entry that the money was not paid as the plaintiff said that it was. That is, the argument was, that if the defendant had received the money he would have entered it in the book, and because there was no entry he did not receive it. This was inadmissible. Morse v. Potter, 4 Gray, 292.

Exceptions overruled.

WHITLEY GROCERY COMPANY v. ROACH.

115 Ga. 918. (1902)

FISH, J. Roach, as trustee for Bagley, a bankrupt, sued the Whitley Grocery Company and the Bank of Southwestern Georgia, to recover certain personalty, or its value, which plaintiff alleged that Bagle, while insolvent, for the purpose of paying his past due indebtedness to defendants, and with the intention, then known to them of giving them a preference over his other creditors, had transferred to defendants within four months prior to the filing of the petition in bankruptcy against him. Upon the trial a verdict was rendered for the plaintiff against the Whitley Grocery Company; it moved for a new trial, which being refused, it excepted.

Two stocks of merchandise located, at the time of the transfer, in Sumter county, were portions of the property for which the action was brought. The value of this merchandise and the exact date on which it was transferred by Bagler were important questions in the trial of the case. It appeared that Bagley sold the merchandise to Clegg, an agent of the Whitley Grocery Company, and that Clegg afterwards sold it to "The Cash Store" at Cardele. Defendants, for the purpose of showing the date it was made and the value of the merchandise, offered in evidence an inventory of the goods, purporting to have been made by Hearn, one of the partners who owned "The Cash Store," and Horne and Collins, two clerks therein, after the sale by Clegg to "The Cash Store." This inventory was offered in connection with the testimony of Hearn and Horne; Collins not being introduced as a witness. It was excluded by the court, and this ruling was complained of in the motion for a new trial. There was no merit in the complaint. Hearn, on cross-examination, in reference to the inventory, testified as follows: "Mr. Horne and Mr. Collins made all these entries in this book. This is the book. That 'A. G. S.' is the cost mark. 'Leo Washington' was the cost mark. Mr. Horne wrote this. The book was written by Mr. Horne and Mr. Jim Collins; there is where Mr. Collins wrote (indicating). I didn't do any of the writing, I called it out; they put it down as I called it out, did it under my directions part of the time. Mr. Horne or I made that entry. (Examining entry) Mr. Horne made it. I am swearing to that because I saw it when it was done." Horne testified, as to the inventory: "I know something about the invoice presented in book; it is the invoice of the Bagley stock, that

is, so much as was received at The Cash Store; that is the invoice that was taken at The Cash Store, checked up what we received. That is a correct invoice. This submitted to me is in my handwriting, and it is correct; it is all right." Hearn and Horne both swore, in a general way, that the inventory was correct, but it is evident that they could not know of this of their own knowledge. Hearn's testimony that it was made by himself, Horne, and Collins, in the manner set forth in his evidence, was not controverted, so we take it as true that the inventory was prepared in that way. Hearn made none of the entries; he simply called items for Horne or Collins to enter. What items he called and who entered them, Horne or Collins, did not appear. Horne and Collins also called items, and the one entered those called by the other, but such items were not identified, and it did not appear that Hearn had any knowledge whatever of them. Nor was it shown that Horne had any knowledge of the items called by Hearn and entered by Collins. The inventory as a whole was, therefore, not admissible as a memorandum upon the testimony of Hearn or Horne, or their joint testimony, because neither of them aided in the preparation of all of it, and it could not possibly represent their respective recollections of the items called and the entries made about which they, respectively, had no knowledge at the time the inventory was prepared. Moreover, the portion of the inventory made up of the items called by Collins and entered by Horne would seem in the absence of Collins's testimony as to their correctness, to be hearsay. It was held in Phenix Insurance Co. v. Hart, 112 Ga. 765 (4), that: "Before a memorandum made for the purpose of preserving a record of a given fact or transaction can, in any event, be admitted in evidence as original testimony, it must affirmatively appear that it was made by the witness in connection with whose testimony it is offered, and that testimony must show absolutely the genuineness and correctness of the memorandum."

Judgment affirmed. All the Justices concurring, except Lewis, J., Absent.

HERRIOTT v. KERSEY.

69 Iowa 111. (1886)

The petition contains four counts, and the plaintiff seeks to recover rent under an express contract on an account for money received, and for the use and occupation of certain premises. There was a denial of the allegations of the petition and a counter claim pleaded by the defendant. Trial by jury, judgment for plaintiff, and defendant appeals.

SEEVERS, J. Certain books, purporting to be plaintiff's books of original entry, and identified as such, were introduced in evidence, and it is insisted that the books contained numerous charges, which were not made by either of the witnesses who testified in relation to the books. We understand that the entries were made by four persons, three of whom were witnesses and gave the requisite statutory evidence in relation thereto; and the court said, as to the entries made by the fourth person, Atkinson, that the books could not be introduced to prove the charges made by him. To our minds, it is perfectly clear that the point made by counsel is not well taken.

Affirmed.

SCHLICHTER v. WHYTE.

74 N. J. Eq. 839. (1908)

PARKER, J. This is a suit for an accounting between former partners.

The fifth exception is that the master charged the defendant with items of cash shown on the ledgers without other proof.

The point made by appellant, is, in substance, that the ledgers were not available as evidence without the day books or other books of original entry. The proof shows that the parties as partners kept partnership books by paid bookkeepers, and that these books consisted of memorandum day books called "blotters" and "ledgers." The blotters seem to have disappeared. The ledgers were fully identified as those of the partnership.

Counsel rely upon the cases in our reports, holding that as between tradesmen and their debtors the books of account of original entry

are admissible, but that other books, in which these original entries are posted are admissible only as supplementary to the books of original entry, so that the whole of the account should appear, and that the ledgers without the books of original entry are not admissible. Bonnell v. Mawha, 37 N. J. Law, 198; Rumsey v. New York and New Jersey Telephone Co., 49 N. J. Law 322; Diament v. Colloty, 66 N. J. Law 295.

These decisions undoubtedly indicate the law of this State on that subject, but in our view are not applicable to this case. The parties here were partners, so that each partner was an agent for all the others as to partnership transactions. So also the bookkeepers employed by them from time to time were agents for every partner as against the others, and, therefore, entry in the ledgers by a bookkeeper in the course of his employment constituting a charge against one partner in favor of the others, amounted to an admission by the partner against whom it was charged. In this view of the case the ledgers were properly admitted.

The decree appealed from will be affirmed.

SWAN v. THURMAN.

112 Mich. 416. (1897)

Assumpsit by Thomas Swan against Charles Thurman for goods sold and delivered. From a judgment for plaintiff, defendant brings error. Reversed.

HOOKER, J. The defendant appeals from a judgment against him in an action of assumpsit, alleging two errors:

1. That plaintiff's books of account were improperly admitted in evidence.

2. That the plaintiff had assigned his claim to another as security, and has no authority to sue for and collect it upon his own account and in his own name.

The latter contention is based upon a chattel mortgage which covered the plaintiff's stock and included his accounts. In addition to the usual provisions of chattel mortgages, this mortgage contained the following, viz.:

"It is agreed that until default be made by the mortgagor in one or more of the conditions above recited, or proceedings are taken to

foreclose this mortgage, the mortgagor may possess, sell, and use said mortgaged property in the regular course of retail business, but not for any other purpose."

The evidence in support of the plaintiff's account consisted of the testimony of the bookkeeper, who stated that he kept the books of the plaintiff which contained the accounts. It appeared conclusively that the bookkeeper had no personal knowledge of the sale and delivery of the goods; all that he knew about their delivery being obtained from slips handed to him daily by the waiters, who took the orders and delivered the articles. It is sometimes proper to admit books of account as evidence of the acts of those who keep them, where the entries are contemporaneous with the acts recorded; but where the book is as in this case the record of the acts of others, not within the personal knowledge of the bookkeeper, but made up by him from the statements of others, such book is hearsay. From the earliest cases, the admission of entries by third persons has proceeded upon the theory that such person had personal knowledge of the fact stated in the entry. Such was the case in the leading case of Price v. Earl; Torrington, 1 Salk. 285, where though the entry was made by one who did not deliver the goods, it was made in the presence of and was signed by the drayman who did, and it was treated as the entry of the drayman, and admitted after his death. In Smith v. Blakely, L. R. 2 Q. B. 326, Blackburn, J., says of the English authorities.

"The rule to be collected from all the cases is that it is an essential fact to render such entry admissible, that not only it should be made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a record of it."

In Welsh v. Barrett, 15 Mass. 380, Parker, C. J., said:

"But what a man has actually done, and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury."

See, also, Nicholls v. Webb, 8 Wheat. 326; Livingston v. Tyler, 14 Conn. 493.

The general subject is exhaustively discussed in a note to Price v. Earl of Torrington, 1 Smith Lead. Cas. 344, but we find nothing consistent with the proposition that entries made by a third person, living or dead, may be introduced to prove facts regarding which it is shown that he had no personal knowledge at the time the entries

were made. 'It was necessary in this case to make further proof, before it could be said that these books made a *prima facie* case.

In Jackson v. Evans, 8 Mich. 476, the defendant was charged with brick which were delivered by plaintiff's teamsters. One witness counted the brick when loaded, and kept account of them in a tally book or slate, until evening or the next day, when he reported the number to the plaintiff, but made no entries nor charges in plaintiff's books. It was held that these were not original entries. But the court held that, before the books could be introduced, it was necessary to call the teamsters, and, while they might not be able to remember how many bricks they delivered to the defendant, they might remember that all loaded for him were delivered, which "would be a very important link in the chain of circumstances to prove a sale and delivery of the articles charged." The court said: "The teamsters, can prove the delivery. Evans proves the number loaded and hauled away, and that he reported them to the defendant (in error), who entered them in his books. This makes up the *res gestae*."

We are of the opinion that the books were not admissible without further proof, and that the defendant was entitled to a directed verdict.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

CHISHOLM v. THE BEAMAN MACHINE CO.
AND
CHISHOLM v. OSWALD KUTSCHE.

160 Ill. 101. (1896)

MAGRUDER, J. These cases were tried by agreement before a judge of the Superior Court of Cook County without a jury. No propositions were submitted by either side to the trial court to be held as law in the decision of the case. There is, therefore, no question before us for our consideration, except the question hereafter mentioned as to the correctness of the ruling of the trial court in the admission of certain evidence.

Upon the trial below, the plaintiffs were permitted to introduce in evidence the books of account of the Beaman Machine Company over the objection of the defendants, to which ruling exception was duly taken.

The evidence shows the following mode of keeping account of the time spent in work upon the machines: Each workman at the end of each day made out a time check or slip in his own handwriting, stating therein the number of the piece he had worked upon and the number of hours he had worked thereon during the day; at the close of day he dropped this time-slip into a locked box, arranged like a letter-box, in the tool-room of the shop; the next morning the foreman of the shop took these time-slips out of the box, checked them over, went to see the workman who made the slip if anything was wrong about it, marked the slips, "approved," which were found to be correct, and then turned them over to the bookkeeper in the usual way; the bookkeeper on the same day, or the following day, made a transcript of these tickets or time-slips into a book called the time book, the entries therein showing the number of the piece of machinery worked upon, the name of the workman and the amount of the time. During the time when the work was done upon these brick machines from the early part of May, 1890, to the early part of December, 1890, the entries in the time-book were made by two bookkeepers. When the books were introduced, these bookkeepers were placed upon the stand and swore, that the entries in the time-book were correct; that such entries were a correct transcript of the tickets, and for the work done in the shop, as shown by the tickets; that the entries were made from the tickets made out by the men in the shop, and generally handed to the bookkeeper by the foreman the next morning; that the tickets were examined by the bookkeepers, and when any errors were found, they were corrected by the foreman and the bookeeper before the entries were made in the books.

The foremen, who had charge of the workmen during the progress of the work upon the machines, and who examined and approved of the tickets or time-slips, were also put upon the stand, and swore to their signatures upon the time-slips; that they had looked them over, and had superintended the men, and had had charge of their work; that the tickets, turned in for the work, as signed and approved by them, were correct, and correctly represented the time; and that the work specified on the tickets was done.

We think, that the books were properly admitted in evidence in connection with proof of the facts and circumstances already detailed. Their mere admission was not a determination of the weight to which they were entitled as evidence, and it was the privilege of the appellants to attack their reliability by any legitimate testimony tending to show their incorrectness.

The entries in the account book, or book of original entries, may be proved by the clerk who made them if he is alive and can be produced. In order to make the book admissible, it is necessary that the entries therein should have been made in the ordinary course of business by a person whose duty it was to make them and that they should have been made contemporaneously with the doing of the work, for which the charges are made, so as to form a part of the *res gestae*.

Where the clerk, who makes the entries, has no knowledge of their correctness, but makes them as the items furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof—such as the transactions are reasonably susceptible of—from other sources should be produced. (House v. Beak, *supra*.)

Where there is original evidence that laborers were employed, and that their time was correctly reported by persons having personal knowledge of the facts, and that these reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and where this original evidence is combined with proof by the person receiving the reports that he correctly entered them as reported in the time-book in the usual course of his business and duty, the entries so made are admissible as evidence to show the amount of work done. (Mayor of New York v. Second Avenue Railroad Co., 102 N. Y. 572; In re McGoldrick v. Traphagen, 88 id. 334; Little Rock Granite Co. v. Dallas County, 66 Fed. Rep. 522; Redlich v. Bauerlee, 98 Ill. 134.

Judgment affirmed.

ARCHITECTS & BUILDERS v. STEWART.

68 W. Va. 507. (1911)

MILLER, Judge. The court below sustained defendant's demurrer to plaintiff's evidence, and entered judgment thereon for demurrant. Defendant offered no evidence except her own to the effect as executrix she had found among decedent's papers no account of memorandum showing any indebtedness to plaintiff. On cross-examination,

however she admitted, that as far as she knew decedent kept no regular books of account with individuals.

The action was assumpsit, plaintiff demanding of decedent's estate, a balance alleged to be due it on account growing out of contracts to build certain houses, barns, &c.

Plaintiff offered as witnesses to prove the account Miss Dickey, its bookkeeper and stenographer, and also McNulty, its president and general manager. Miss Dickey proved that she was the bookkeeper and stenographer of plaintiff during the time covered by the account sued for; that she kept the books of plaintiff and made entries in the account against decedent in the regular course of business, and that decedent in his lifetime was indebted to plaintiff in the sum of $415.54, the balance sued for. In connection with her testimony, the ledger, the book of original entry, was also offered and admitted in evidence. The witness also testified that she had seen the contract between plaintiff and decedent to do the work covered by the account; that she had made up the book statements of the account against decedent in his lifetime, and mailed them to him, and that if he had ever disputed the account it had not come to her knowledge. On cross-examination, however, the witness admitted that she had no personal knowledge of the correctness of the several items in the account, except that she had kept them on file as they had been turned in to her and that she had made the entries from information given her by McNulty, and by one Wine, who she describes as partner and foreman.

McNulty was offered as a witness to supplement the testimony of the bookkeeper, but defendant objecting thereto, his evidence was excluded so far as it related to personal transactions with decedent in his lifetime, as incompetent because of interest.

The only question presented for decision is, did the court below err in its judgment on the demurrer to the evidence? Plaintiff did prove by McNulty, also by Taylor, who had been president and manager, that Miss Dickey was bookkeeper, and that it was customary for all items of business to be turned into the office and to be kept by her; and by McNulty, on cross-examination, defendant proved that after the item, to check $375.00, charged in the account, he had in his own handwriting, about the time of the entry by Miss Dickey written the words "money loaned." On re-direct examination the check with indorsements was, without objection, admitted in evidence.

By her demurrer to the evidence defendant has apparently staked her defense upon the proposition that the evidence of Miss Dickey

was lacking in the essential requisite of personal knowledge of the transactions, entered by her, to render her testimony in connection with the books legal and competent evidence as against defendant of the truth of such entries. The general rule undoubtedly is, as stated in Vinal v. Gilman, 21 W. Va. 301, that to render such entries legal and competent evidence, the book of account must be (1) a book of original entry; (2) the entry co-temporaneous, or practically so, with the transaction; (3) it must be made in the regular course of one's business or employment, and (4) the entrant must have had personal knowledge of the transaction. See also 1 Elliott on Ev. sec. 455, *et seq.*; 17 Cyc. 391, *et seq.*

It is not claimed the plaintiff's evidence was lacking in any of these requisites, except the fourth. Did this want of personal knowledge on the part of Miss Dickey, under all the facts and circumstances disclosed by the record, justify the judgment of the court on the demurrer to the evidence?

Can the case we have here be brought within any recognized exception to or limitation upon the general rule? 2 Wigmore on Ev. sec. 1530, referring to sec. 1522, for a discussion of the circumstantial guarantee of trustworthiness, contains a full discussion of the subject of these exceptions and limitations, too long for quotation, but to which reference is made for the learning on the subject. He there shows, by reference to the judicial decisions, some of which have already been cited by us, how in the event either the entrant with or without personal knowledge of the transaction, or the one with such personal knowledge and on whose information, oral or written, the entry was made, or both, be dead or unavailable as witnesses, the entry having been shown to have been made in the usual course of business and according to an established custom of conducting the business, the element of personal knowlege is thereby supplied, rendering the entry available as legal evidence, on principles of necessity, or inconvenience in obtaining the witnesses. "The conclusion is, then," says this writer, "that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so." And as a reason for recognizing and applying the exception where applicable,

this writer says: "Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedient which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical." The writer follows this statement of the principle by quotations from and citations in foot notes of numerous judicial decisions sanctioning and applying the principle. It is wholly unnecessary to do more than refer to this discussion of the subject by that writer. In Insurance Co. v. Seaboard Air Line Ry., *supra,* the North Carolina court quotes at length and approvingly from this section in Wigmore, in support of the conclusions reached in that case.

We think the principle of the exception sound, and supported by reason and judicial authority, and that it is one which ought to be recognized and applied in this case. Otherwise plaintiff, because of the death of decedent, and the objection to and the unavailability because of interest of the evidence of living witnesses must lose what we must assume is a meritorious debt and claim against decedent's estate.

For the reasons given we are of opinion that plaintiff made a *prima facie* case entitling it to a submission of its evidence to the jury, and that the court below erred, as a matter of law, in sustaining the demurrer of the defendant thereto, and entering judgment for thereon.

Reversed and judgment rendered.

F. DOHMEN CO. (Limited) v. NIAGARA FIRE INS. CO.

96 Wis. 38. (1897)

This is an action on a fire insurance policy issued on the 30th day of June, 1892, for the term of one year, insuring plaintiff's property, described therein, to the amount of $2,500. Such property consisted of a wholesale stock of drugs, medicines, paints, and other merchandise kept by plaintiff in its wholesale establishment in the city of Milwaukee. The policy was one of several by which insurance was carried on such property to the amount of $65,500. On the 28th day of October, 1892, such property was partially destroyed by fire. Plaintiff claimed to have suffered damages on such property by such fire in a sum in excess of $57,000. This action was brought to recover the proportionate share of such loss represented by the policy in question. The complaint is in the usual form. Defendant answered, putting in issue the amount of the loss, and alleging that the policy contained a provision rendering it void in case of any fraud or false swearing on the part of plaintiff, and that plaintiff had been guilty thereof.

MARSHALL, J. It is further contended that the judgment should be reversed for error in allowing Fred Dohmen, Sr., and Henry Dohmen to testify from the corporation account books respecting the amount of goods on hand at the time of the fire. This is the evidence specially referred to in the preceding paragraph. Fred Dohmen, Sr., testified without objection to the amount of goods on hand as shown by the inventory of February, 1891, and also testified to the correctness of such inventory. With that as a starting point, and without verifying the correctness of the account books in any way, he was allowed against objection, to testify to the amount of purchases from the time such inventory was made up to the time of the fire, also as to the amount of sales during such period, as recorded in such books. The value of the goods when the fire occurred was then determined by adding to the amount as shown by such inventory the amount of the subsequent purchases and deducting therefrom the sale as shown by the books; then adding to the result the percentage of profit which the witness Fred Dohmen, Sr., said the plaintiff averaged to make in the business. Thus the question is clearly presented of whether the amount of stock on hand at the time of the fire, under the circumstances, could properly be established by testimony given of the contents of the books by a person who did not keep them, was not

able to verify their correctness in any way, and without such correctness being verified in any manner, or the books being in evidence. That question must be answered in the negative. No authority has been brought to our attention, either by respondent's counsel or otherwise, that justifies the admission of such evidence.

Just how to proceed in such a case is by no means free from difficulty. In a large business, obviously it is impossible to produce witnesses to testify of their personal knowledge respecting the amount of stock on hand, or to the purchases and sales which may have occurred during a long period of time. The bookkeeper cannot ordinarily be expected to testify to more than that the entries made by him are correct, according to the facts as reported to him in the regular course of business. Such information must necessarily come to him from a variety of sources; and to verify the same, except in the most important transactions, in a large business, would be utterly impossible. There is a surprising dearth of authority on the question, considering the frequency with which the difficulty must be met in adjusting losses under similar circumstances. The general principles of the law of evidence applicable to the subject properly understood, will furnish a safe guide. One of the most familiar rules is that the best evidence the nature of the case is susceptible of must be produced. 1 Greenl. Ev. sec. 82. From the very nature of the case, the only evidence of a definite character that could be produced was such as could be given by the aid of the books. The stock of goods that existed, according to the inventory of February, 1891, had been added to in the regular course of business for over a year and a half, and the whole had been reduced by daily sales during that time. The multitude of transactions during such period, of goods taken in and sent out, could not be established by evidence from the mouths of witnesses. The only evidence that existed was locked up in the books. Such being the case, upon such books being reasonably verified as correct records of the daily transactions in the business as such transactions were regularly reported to the office to be recorded in such books, with proof that the books were relied upon by the plaintiff solely as a repository of the facts in regard to the business, and that they were uniformly found to be correctly kept, a witness who had occasion to refer to them from time to time, and had thereby, and through a general knowledge of the business, been convinced of their correctness, might properly testify, by their aid, to their contents as facts, without having personal knowledge of such facts independent of the books, and without ever having had any

other knowledge of all the individual transactions than such as one might be reasonably expected to have by generally overseeing a business. Such evidence would not be conclusive by any means, but would constitute evidence bearing on the question in suit proper to be submitted to the jury with all the other evidence in the case.

Here there was no proper foundation laid for the use of the books. They were merely produced as the books of account kept in the business, and, without any verification whatever, the witnesses were allowed to testify respecting their contents. There is no rule with which we are familiar that warranted the admission of the evidence under the circumstances. It was prejudicial error, for which the judgment must be reversed.

BY THE COURT.—The judgment of the Superior Court is reversed and the cause remanded for a new trial.

RAILWAY COMPANY v. HENDERSON.

57 Ark. 402. (1893)

Action by Henderson & Jelks against the St. Louis Iron Mountain & Southern Railway Company. The complaint substantially alleged that plaintiffs purchased, at Auvergne, in Jackson county, Arkansas, 13 head of Jersey cattle; that their vendor, J. T. Henderson, contracted with the Batesville & Brinkley Railway Company to transport the cattle from Auvergne to Searcy in White county, Arkansas; that the latter company furnished a car, which it had obtained from defendant railway company, for the purpose of transporting the cattle; that the car so furnished was at the time infected with the germs of Texas or Southern cattle fever; that said infection was produced by the droppings of diseased cattle which had been transported therein, and that defendant had negligently permitted such droppings to remain in the car until it had become infected with the germs of the cattle fever; that, by reason of said infected condition of the car, plaintiffs' cattle became infected with the fever, and in a short time after their arrival at Searcy nine of them took sick and died.

The jury returned a verdict for $900. A motion for a new trial was overruled, and defendant appealed.

MANSFIELD, J. We have carefully examined all the evidence con-

tained in this record, and our conclusion is that it admits of no theory on which we can hold it sufficient to support the verdict.

As the cause must be remanded for further proceedings, it is necessary to notice some of the questions arising in the course of the trial.

In connection with other circumstances which were in evidence, the record produced by the witness, Hubbard, showing the movement of cars at Diaz station during the year 1889, would have tended to prove that Missouri Pacific Car No. 6335, in which the plaintiffs' stock were shipped, had not been recently used in the carriage of other cattle. The statement of Hubbard is not very explicit; but we take it to mean that the entries in the record are in the handwriting of Clayton, the absent witness, and that they were made in the performance of his duties as agent of the company. If such was the nature of the entries, and they were contemporaneous with the facts recorded, and there was no reason to question their fairness, we think they were admissible on being properly authenticated. Mr. Greenleaf places the admissibility of such entries on the ground that they are part of the *res gestae,* and he treats them as original evidence which may be received independently of the testimony of the person making them. They must, however, be authenticated by his oath if he is living and his testimony can be procured. If he is dead, or is out of the jurisdiction of the court, or cannot be found, they may be admitted on proof of his handwriting. 1 Greenleaf Ev. secs. 115, 120; 1 Whart. Ev. secs. 238, 240, 250, 678, 683, 688; Welsh v. Barrett, 15 Mass. 380; Bartholomew v. Farwell, 41 Conn. 230; Price v. Earl of Torrington, 1 Smith's Leading Cases (8th ed.) 563, 575; Sneed v. State, 47 Ark. 180 and cases cited. But it is incumbent on the party offering entries of this kind, unauthenticated by the oath of the person who made them, to show, as a prerequisite to their admission, that such person cannot be produced as a witness; and when he is living, some discretion must be allowed to the trial court in deciding whether proof offered as preliminary to the introduction of the entries is sufficient to admit them as in the case of the witness' death. Sneed v. State, 47 Ark. 180, 185. The bill of exceptions does not inform us that the statement made by defendant's counsel as to their inability to secure the testimony of Clayton was received as evidence; and if that statement be disregarded, it does not appear that it was error to exclude Clayton's entries, with no proof before the court that he could not be found, except that Hub-

bard swore that his place of residence was unknown, without stating whether any effort had been made to ascertain it.

Reversed on another ground.

CONTINENTAL NATIONAL BANK v. FIRST NATIONAL BANK.

108 Tenn. 374. (1901)

WILKES, J. The bill in this case seeks to hold the First National Bank of Nashville liable to the Continental National Bank of Memphis for about $30,000.

The ground of liability as claimed is, that the Nashville Bank in its own interest, and for its own benefit, falsely and fraudulently represented to the Memphis Bank that certain parties on paper presented to it for discount were good and solvent, when, as a matter of fact, they were insolvent, and the Memphis Bank in consequence, lost the greater part of the money loaned.

It is said it was error to introduce the books of the bank in evidence. They were produced and identified by the cashier. It is said the defendants should have gone further and shown by the party who made the entries that they were correct.

The books were introduced to show the state of accounts between the Nashville Bank and Duncan, Gaines & Morrow, the object being to show by the course of dealing between the bank and these parties that the bank was treating and dealing with them as solvent, reliable customers.

It has been held that where it becomes material, either for or against a corporation, and as against a stranger, or as between two strangers, to prove what was done by the corporation, its books and records are admissible in evidence, and they are the best evidence. 6 Thomp' Corporations, sec. 7734.

We think it not necessary that the bookkeeper who made the entries should be examined as to their correctness.

At most, he could only testify that the entries made by him are true entries of transactions reported to him by others. In other words, he could only testify that he wrote down what others told him. The court knows, as a matter of common information, that there are many persons in the employ of banks, and each has his

different department, and each transaction passes through the hands of several—it may be of many persons. We take a deposit, for instance. It goes into the hands of the receiving teller, thence into the hands of a journal clerk, thence to the individual bookkeeper, or such other officials as perform the functions of these officers. When it reaches the hands of the bookkeeper, who makes the final entry, which stands as the true statement between the bank and depositor, it has gone through the hands of a dozen parties, perhaps, and the last party only records what comes to him through so many hands, and knows nothing, it may be of the actual transaction. It would seem that the cashier, whose function it is to overlook all transactions at the counter, and over the books, and test each transaction through all its stages, should be the person most competent to produce the books and vouch for their accuracy.

We do not think there is any reversible error in this assignment.

Looking at the case as a whole, it is evident that before complainant can recover, it must show that it was fraudulently misled by the defendant to make the loan it did.

Upon the whole case we think the complainants have wholly failed to make out a case of fraud upon the part of the Nashville Bank, and to establish any ground of liability against it, and the decree of the Court of Chancery Appeals is affirmed.

THE CHICAGO & ALTON R. R. CO. v. THE AMERICAN STRAWBOARD CO.

190 Ill. 268. (1901)

PER CURIAM. For the purpose of establishing the quantity of straw destroyed by the fire, appellee, in addition to much oral evidence, was permitted against the objection of appellant, to introduce eighteen instruments of writing called "stack sheets." It is urged these instruments were not competent to be received in evidence.

It appeared from the testimony the appellee company, in the regular course of transacting the business in which it was engaged, placed the straw which it owned in large stacks; that each stack was given a number, and that a sheet called a "stack sheet," was kept for each stack as the mode adopted, in the regular course of its business by the appellee company, of keeping an inventory of the amount of straw

on hand. The purpose they were intended to serve was to correctly advise the appellee company of the amount of stock or straw which it had on hand. The information contained in the stack sheets was to aid the appellee company in the proper transaction of its own business, and were intended to be accurate, for the company could have no purpose or intent to deceive itself. On the contrary, the controlling motive in the preparation of the stack sheets was to accurately and truthfully set down the facts as they existed. Such stack sheets were made up from scale tickets and memoranda kept by the person who did the weighing at the scales where the straw was weighed and received into the company's possession, and the parties who transcribed the weights from such scale tickets and memoranda were produced in court as witnesses, and each testified, for himself, that the transcription by him made was correctly made in each instance. The parties who transcribed the weights from the scale tickets to the stack sheets were the persons who weighed the straw as received and made the scale tickets, and each testified, for himself, that the weights were correctly taken and correctly set down on the scale tickets. It appeared that the scale tickets showing the weight of the straw as received in car-load lots, or in wagon loads, as the case might be, had been lost or destroyed; that it was not the custom of the appellee company to preserve them after they had been transcribed onto the stack sheets. The contention of counsel for the appellant company is, that these scale tickets constituted the original entries as to the transactions, and that the copies therefrom, as shown on the stack sheets, were not admissible in evidence.

Without deciding whether, in the adjustment of accounts between the appellee company and those from whom the straw was purchased, these scale tickets should be regarded as the original entries, it is quite clear that so far as they were connected with the preparation of the stack sheets as a means of keeping an account or inventory of stock on hand, they were but memoranda, and the stack sheets here shown to have been prepared from them were admissible as original documents, as tending to show the number of tons of straw in each stack. Upon this point the following remarks in the opinion of the Appellate Court are adopted as expressing the views of this court: "These stack sheets were, in effect, inventories of the quantities of straw in the several stacks destroyed, and the testimony of Yost, Van Horn and Sager, when all considered, shows they were correct inventories and correctly made up from the original notations, and that the latter had been lost or destroyed. It is only by such testi-

mony the quantities of goods destroyed by fire can usually be proved, for no witness can carry such numerous details in his memory. When the persons who made such statements testify they made them correctly, the papers so made are admissible in evidence. In Insurance Co. v. Weides, 14 Wall. 375, the owners of a stock of goods destroyed by fire proved they took a correct inventory at a certain date; that the inventory was reduced to writing in an inventory book; that the prices or values were correctly footed therein; that the footings were correctly copied upon the fly-leaf of an exhausted ledger and afterwards transferred to the fly-leaf of a new ledger; that the inventory and exhausted ledger had been destroyed and that none of the witnesses could remember the amount of the inventory or footings. It was held the entry of the footings on the fly-leaf of the new ledger was competent evidence in connection with the oral testimony. It was there said that it had been many times decided that such papers, accompanied by such proof, are receivable in evidence."

Judgment affirmed.

PEOPLE'S NATIONAL BANK OF MIDDLETON v. RHOADES.

90 Atl. Rep. 409 (Del.) (1913)

Action of assumpsit (No. 81, May Term, 1912) on the common counts with bill of particulars filed, to recover from the defendant, a depositor in the plaintiff bank, overdrafts amounting to $1,457.43.

At the trial the checks and notes drawn by the defendant on his account in the plaintiff bank and paid by it were admitted in evidence by agreement. The plaintiff offered the individual journal No. 14, containing the debits and credits of all the depositors in the bank, covering the year 1906, and counsel stated that he wished to prove the entry of November 28, 1906, leaving the entry of the first check in the series, paid by the plaintiff, previously admitted in evidence; the purpose of the testimony being to show the state of the defendant's account in the bank.

Mr. Handy objected on the ground that such testimony would be testimony of a cash item in a book account to charge the defendant, which would be contrary to the provision of the statutes of this state. Revised Code 1852, amended to 1893, p. 799, c. 107.

RICE, J. The statute of this state (Revised Code 1852, amended

in 1803, p. 799, c. 107, sec. 11), in respect to a book of original entries, regularly and fairly kept, shall, together with the oath, or affirmation, of the plaintiff, be admitted in evidence to charge the defendant with the sums therein contained for goods sold and delivered, and other matters properly chargeable in an account. Cash items are not properly so chargeable."

While there can be no doubt, and it has often been decided by the court, that in a merchandise business cash items are not such items as are properly chargeable in a book account, yet we think when the business is one of banking, where the commodity dealt in between the depositor and the bank virtually is cash, then it does constitute an item properly chargeable in a book account. It comes within the provision of that part of the statute which permits "other matters properly chargeable in an account" to be admitted in evidence, and it does not fall within the inhibition that "cash items are not properly so chargeable." We are of the opinion, as between a bank and a depositor, that a book of original entries regularly and fairly kept, containing cash items of the account of the depositor with the bank, may, under the provisions of the statute, be admitted in evidence to charge the depositor with the items. We overrule the objection and admit the book in evidence.

Notes. The rules of evidence pertaining to account-book entries and entries made in the regular course of business have some features in common, but they are not at all synonymous. They are closely allied in principle and probably are traceable to a common origin, but their historical development has been quite different. Moreover, the rule of evidence pertaining to the former had its origin nearly a century before the rule pertaining to the latter. And both of these rules, as previously stated in a foot-note, originated before the rule against hearsay.

Account-book entries are inadmissible in a suit between strangers, whereas entries made in the regular course of business are admissible.

The historical development of the rule relating to account-book entries has been quite different in this country from that which has obtained in England.

DECLARATIONS IN REGULAR COURSE OF BUSINESS.[1]

MAYOR OF N. Y. v. SECOND AVE. R. R. CO.

102 N. Y. 572. (1886)

This action was brought to recover damages for an alleged breach of contract.

Defendant, having obtained permission to lay its railroad with a double track over portions of certain streets in the city of New York, entered into a contract with the city by which it covenanted among other things "that the said company shall pave the streets in and about the rails in a permanent manner and keep the same in repair to the entire satisfaction of the street commissioner." Defendant failed to keep one of the streets covered by the contract in repair. Notice of the condition of the street and that if it did not within thirty days thereafter repair the same, the department of public works would make the necessary repairs and defendant would be held responsible for the expense was served upon the defendant. It having failed to comply with the notice, the work was done by the department and the expense thereof plaintiff claimed to recover herein.

ANDREWS, J. There was no evidence showing that the charge for labor in the account of the city was excessive, or that more laborers or materials were provided than were reasonably required. We are of opinion, therefore, that the direction of the verdict for the sum actually expended by the city, in making the repairs, was not error.

A more serious question is raised by exceptions to the admission in evidence of a time-book kept by one John B. Wilt, and of a written memorandum or account made by him, offered to prove the number of days' work performed and the quantity of material used. Wilt was a foreman, in the employ of the department of public works, and had general charge of the repairs in question. Under him were two gang foremen, or head pavers, Patrick Madden and Charles Coughlan, each having charge of a separate gang of about ten men employed on the work. Wilt kept a time-book, in which was entered the name of each man employed. He visited the work twice a day, in the morning and afternoon, remaining from a few minutes to half an hour each time, and he testified that while there he checked on the time-book the time of each man, as reported to him by the

[1] Hughes on Evidence, p. 117.

gang foremen. He also testified that he marked the men's names as he saw them, and that he knew their faces. The gang foremen did not see the entries made by Wilt, but they testified that they correctly reported to him each day the names of the men who worked, and if any did not work full time, they reported that fact also. Upon this proof, the trial judge admitted the time-book in evidence, against the objection of the defendant. The trial judge also admitted in evidence, under like objection a written memorandum or account, in the handwriting of Wilt, of materials used. Wilt testified that the entries in the account were made from daily information furnished by the gang foremen, on the occasions of his visiting the work and that he correctly entered the amounts as reported. It does not appear that he had any personal knowledge of the matters to which the entries related. The gang foremen were called as witnesses in support of the account. Neither of them saw the entries, and on the trial neither claimed to have any present recollection of the specific amounts so reported by them. Madden testified that he reported the correct amounts to Wilt, and it is inferable from his evidence that when the reports were made, he had personal knowledge of the facts reported. Coughlan also testified in general terms that he reported the items correctly. But on further examination it appeared that his reports to Wilt of the stone delivered at the work, were made upon information derived by him from the carmen who drew the stone, and who counted them, and who reported the count to Coughlan, who in turn reported to Wilt. Coughlan saw the carmen dump the stone, but he did not verify the count, but appears to have assumed its correctness. The carmen who delivered the stone were not called as witnesses.

The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved on this branch of the case, was the number of day's labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge, from personal observation, was manifestly incomplete, and the time-book was made up, mainly, at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen, or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt, to be true, but they did not see the entries made, and

could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen. Standing upon his testimony, alone, the entries were mere hearsay. But combining the testimony of Wilt and the gang foremen there was, first, original evidence that laborers were employed, and that their time was correctly reported by the persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions, to which the reports related; and second, evidence by the person who received the reports, that he correctly entered them as reported, in the time-book, in the usual course of his business and duty. It is objected that this evidence taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact. There could be no doubt whatever, except one arising from infirmity of memory, or mistake, or fraud. The gang foremen may by mistake or fraud, have misreported to Wilt, and Wilt may either intentionally or unintentionally have made entries not in accordance with the reports of the gang foremen. But the possibility of mistake or fraud on the part of witnesses, exists in all cases and in respect to any kind of oral evidence. The question arises, must a material, utimate fact be proved by the evidence of a witness who knew the fact and can recall it, or, who, having no personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made an entry of the fact at the time, or recently thereafter, which on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made, or may such ultimate fact be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that of the persons receiving the communication to the effect that he entered at the time, the facts communicated and by the production of the book or memorandum in which the entries were made. The admissibility of memoranda of the first class is well settled. They are admitted in connection with, and as auxiliary to the oral evidence of the witness and this whether the witness, on seeing the entries, recalls the facts, or can only verify the entries as a true record made or seen by him at,

or soon after the transaction to which it relates. (Halsey v. Sinsebaugh, 15 N. Y. 485; Guy v. Mead, 22 id. 462.)

The other branch of the inquiry has not been very distinctly adjudicated in this State, although the admissibility of entries made under circumstances like those in this case was apparently approved in Payne v. Hodge (71 N. Y. 598). We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts, that business transactions in numerous cases are authenticated, and business could not be carried on and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not personally cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill or for other reasons, it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified, as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice. We are of opinion, however, that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested. In Peck v. Valentine (94 N. Y. 569), the memorandum there admitted was not an original memorandum, but a copy of a private memorandum made by an em-

ployé of the plaintiff for his own purposes, and not in the course of his duty, or in the ordinary course of business. The original memorandum was delivered by the one who made it, to the plaintiff, who lost it, but testified that the paper produced and received in evidence was a copy. The person who made the original memorandum was unable to verify the copy. The court held that the copy was improperly admitted in evidence. The decision in Peck v. Valentine rests upon quite different facts from those in this case.

In respect to the admission of the account of material, we think that part of the account based upon the reports of Madden was admissible on the same ground upon which we have justified the admission of the time-book. Madden, in substance testified that he knew the facts and properly reported them, and Wilt testified that he entered them as reported. The part of the account of materials, the items of which were furnished by Coughlan, was not strictly admissible. Coughlan does not appear to have had personal knowledge of the quantity of stone delivered on his part of the work, but took the count of the carman, and his reports to Wilt were based upon the reports of the carman to him. The carman was not called, and the evidence of Wilt and Coughlan was mere hearsay. If the attention of the court had been called by the defendant to this part of the account, and the objection had been specifically taken to the items entered upon the reports of Coughlan, the objection would, we think, have been valid. But the objection was a general objection to the whole account. It was clearly admissible as to the items reported by Madden; and, we think the general objection and exception is not available to raise the question as to the admissibility of the items entered on the report of Coughlan, independently of the others. The whole amount of materials embraced in the recovery was small, and, we think, no injustice will be done by affirming the judgment.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

FIREMEN'S INS. CO. et al. v. SEABOARD AIR LINE RY.

50 S. E. 452 (N. C.). (1905)

Plaintiffs alleged that on the 19th day of October, 1902, certain cotton, upon which plaintiff companies had issued policies of insurance was burned by the negligence of the defendant's agents and servants; that, by reason of the destruction of said cotton, plaintiffs were compelled to pay the value thereof; that the owners of said cotton transferred and assigned to the plaintiffs all rights of action which they had against the defendant company for the negligent burning thereof. Defendants denied the material allegations in the complaint. The parties went to trial upon the following issues: "1. Was the property of the Hamlet Ice Company insured by the plaintiffs, as alleged in the complaint at the time it was burned? Answer. "No." (2) Was the said property burned by the negligence of the defendant company, as alleged in the complaint? Answer. "No." From a judgment upon the verdict the plaintiffs appealed.

CONNOR, J. (after stating the facts). In the trial of this cause it became material to show at what time the defendant's wrecking train No. 371 reached Hamlet, the station on defendant's road at which the cotton was burned. Defendant introduced one C. Lane, who testified that he was employed by the defendant road as train dispatcher to keep a record of the arrival and departure of all trains at all telegraph stations, that the record was made and kept on the train sheet; at the time trains arrived at and left stations, the operator at such station notified the dispatcher, who immediately recorded the time on the sheet as it was reported to him; that such sheet constituted a record of the arrival and departure of all trains; that he governed the movements of trains by such record of the arrival and departure of trains; that on the 19th of October, 1902, the offical report was sent him, and that he immediately recorded thereon the time of the arrival of the extra train, which was the wrecking train at Hamlet of that date; and that he had the record before him. The defendant then offered the record in evidence, for the purpose of showing the time of the arrival of the wrecking train at Hamlet, which witness McDonald testified was taken charge of by shifting engine No. 371 on its arrival. (Objection.) The court ruled that the witness could refresh his recollection by an inspection of the record, enabling him to speak touching his own acts at the time with regard to the matter under inquiry, which at that time

ruled out the declaration which any other agent of the company made to him at the time, by wire or otherwise. The witness stated that he could not state of his own personal knowledge the time at which the wrecking train arrived at Hamlet. The court admitted the record in evidence, showed the entries made to him by wire from the agent of the defendant at Hamlet as to the arrival and departure of said wrecking train, to which the plaintiff duly excepted. Defendant also introduced one J. W. Hunt, who testified that he was employed by defendant company as conductor, and that as such he ran wrecking train on October 19, 1902, from Raleigh to Hamlet; that it arrived at Hamlet at 12:37 P. M. Witness is then shown a book which he identifies as a register showing the time of arrival, which he says is kept at Hamlet; that it was his duty to register the arrival of the train, and that he did register it on that day. He identifies the entry in his own handwriting: "Extra train. Time arrival, 12:37 P. M." Signed by him and also by engineman. This last record was offered by defendant in corroboration of witness Hunt, and the court admitted it for that purpose, so instructing the jury.

It is contended by the plaintiffs that the "train sheets" are not admissible, because, while containing entries made by the train dispatcher in the usual course of business, he had no personal knowledge of the truth of the statements recorded; that he simply recorded information derived from the operator at Hamlet, a hundred or more miles from Raleigh. This, they say, is but hearsay. The defendant, on the other hand contends that the entry made by the train dispatcher, although based upon information derived from the operator, by reason of the circumstances under and the manner in which the information was communicated, is surrounded by all possible safeguards against error, uncertainty, or falsehood, and therefore comes within the exception to the general rule excluding hearsay evidence. The question is of first impression in this state. We have given it careful and anxious consideration, desiring to make no departure from the well-settled principles of the law of evidence or the decisions of this court, at the same time recognizing and keeping in view the duty of the court to make diligent effort to find in those general principles such safe and reasonable adaptability that in the changing conditions of social, commercial, and industrial life there may be no wide divergence in the decisions from the standards by which men are guided and controlled in important practical affairs.

Among the exceptions to the general rule we find "entries and declarations of third parties made in the regular course of duties or

business." Such entries are of two kinds: First, those made by the entrant respecting a transaction conducted by or matter known to him personally, in which no other person has taken any part. Second, those, made by the entrant upon information communicated to him by some other person acting in the line of his duty to make report to him. The entries made by the train dispatcher fall within this rule. It is undoubtedly the general rule that, if the entrant and the person making the report upon which the entry is made are both living and available, they should be produced to testify to the truth of the subject-matter of the entry; that if one be dead or unavailable —that is, insane or beyond the process of the court—the entry may be introduced upon the testimony as to its authenticity of the living, available person. Can the entry be admitted when, as in the case before us, the entrant is living, and the person upon whose report the entry is made is not produced nor his absence accounted for?

An examination of the decided cases discovers a conflict of authority. Prof. Wigmore suggests that when an entry is made in the usual course of business, based upon reports made by one whose duty it is to make such report, but who is not required to make and keep any record of the transaction, the entry so made is admissible upon the ground of necessity, growing out of the fact that it is not to be expected that the person making such report would remember the fact reported, and that he is therefore unavailable in a legal sense. It is not to be expected that an operator, who reports to the despatcher the time of arrival and departure of a number of trains daily, could undertake to testify from memory the hour and minute of each arrival or departure. He has no duty imposed upon him to do so. If he did undertake to testify, as in this case, three years after the event, but little credence would be attached to his testimony. For practical purposes, he is as essentially unavailable as if dead or insane. We are of the opinion that, applying either test, trustworthiness or necessity, the entries made on the trains' sheets were admissible.

Affirmed.

DECLARATIONS FORMING PART OF OR RELATING TO THE RES GESTAE.[1]

COMMONWEALTH v. TREFETHEN.

157 Mass. 180. (1892)

Indictment, in four counts, for the murder of Deltena J. Davis, on December 23, 1891, by drowning.

At the trial in the Superior Court, before Mason, C. J., and Blodgett and Hammond, JJ., the jury returned a verdict of guilty of murder in the first degree against the defendant, Trefethen, and a verdict of not guilty for the defendant Smith; and Trefethen alleged exceptions.

FIELD, C. J. The principal exception is to the refusal of the court to admit the testimony of Sarah L. Hubert. The exceptions recite:

"Sarah L. Hubert, as witness called in behalf of the defendant, testified that her business, which she advertised in the newspapers, was that of a trance medium; that on December 22, 1891, in the forenoon, after ten o'clock, a young woman called at her place of business in Boston for consultation. There was sufficient evidence to go to the jury of her identification as Deltena J. Davis. Upon objection being made to the testimony of this witness, counsel for the defendant stated to the court, aside from the jury, that they offered to prove by this witness that, at the interview on December 22, the young woman aforesaid stated to the witness that she was five months pregnant with child, and had come to consult as to what to do, and added later in the interview that she was going to drown herself. The court refused to admit the testimony, and the defendants duly excepted.

When evidence of declarations of any person is offered for the purpose of showing the state of mind or intention of that person at the time the declarations were made, the declarations undoubtedly "may be so remote in point of time, or so altered in import by subsequent change in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge." Shailer v. Bumstead, 99 Mass. 112, 120.

In the case at bar, the evidence offered was that the declaration of the deceased was made the day before her death, and was made in a conversation concerning her pregnancy, which continued until

[1] Hughes on Evidence, pp. 123 and 134.

her death. The declaration, therefore, was not made at a time remote from the time of her death, and there had been no change of circumstances which made it inapplicable to the condition of the deceased at the time of her death. It was clearly competent for the jury to find from the evidence recited in the exceptions, that, if Deltena J. Davis had an intention to commit suicide on December 22, she continued to have the same intention December 23. If the evidence in its nature was admissible, the court, on the facts stated, could not exclude it on the ground that, from the lapse of time or change of circumstances, it had ceased to be material.

The fundamental proposition is, that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred.

On principle, therefore, we think it clear that, when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person or his behavior, or his actions generally. In the present case the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased.

Verdict against Trefethen set aside.

WHELAN v. LYNCH.

60 N. Y. 469. (1875)

Appeal from order of the General Term of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff, entered on a verdict, and reversing an order denying a motion for a new trial.

This action was brought against defendant as survivor of the firm of Smyth & Lynch, to recover the value of a quantity of wool consigned by plaintiff to that firm for sale.

Upon the trial plaintiff offered, and the court received in evidence, under objection for the purpose of proving market value, the files of a newspaper styled the "Shipping and Commercial Lists Price Current," which purported to give the prices of different grades of wool.

MILLER, J. The court, upon the trial of this action, charged the jury, that if the plaintiff was entitled to recover at all, he would be entitled to the highest price which wool of the description had reached in the market between October 24th, 1864, and the time when the action was commenced, and the defendant duly excepted to the charge.

Independent of the charge, the court was also in error, I think, in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information is contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how, a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out. As there was no such testimony, the evidence was entirely incompetent, and should not have been received. The authorities cited to sustain the ruling of the judge in regard to the admission of this evidence, do not include any such case.

In Lush v. Druse (4 Wend. 314), the witness who testified as to the market price, had inquired of merchants dealing in the article, and examined their books; thus giving the source of his knowledge. In Terry v. McNiel (58 Barb. 241), it does not appear in what form the question was presented, or whether any preliminary evidence had been introduced to show the accuracy of the newspaper quotations. In Cliquot's Champagne (3 Wallace 117), it appeared that the price current was procured directly from dealers in the article and was verified by testimony which tended to show its accuracy. The objec-

tions made to the evidence were sufficient, and its admissibility cannot be upheld within these cases cited.

Without examining the other questions for the errors stated, the order of the General Term must be affirmed, and, in pursuance of the stipulation of the plaintiff's attorneys, judgment absolute ordered for the defendant with costs.

All concur; CHURCH, C. J., and FOLGER, J., in result.

Order affirmed and judgment accordingly.

WRIGHT v. STATE.

88 Md. 705. (1898)

BOYD, J. The appellant was convicted of murder in the first degree in the Circuit Court for Talbot county, to which county the case was removed from Kent county where the homicide occurred. Although the record sets out at some length the proceedings in the cause, there is but one question presented by it, and that is the ruling of the court below on an objection made by the State to the offer to prove by one Joseph Johnson a statement made to him by the prisoner shortly after the shooting of the deceased, William Newcomb. It is contended on behalf of the appellant that the statement was made under such circumstances and at such a time as to be part of the *res gestae* and that is denied by the State. The record does not disclose what the statement was, but the court refused to admit it.

No inflexible rule can be adopted as to what lapse of time between the commission of an act and a declaration made, should exclude the declaration as not being a part of the *res gestae*. Each case must depend upon its own facts and circumstances. The act or declaration sought to be proven must, however, be so connected with the transaction as to be a part of it and great care should be exercised by the courts to prevent abuse of the rule that admits in evidence, under proper conditions, the unsworn statement of an accuser or an accused in his own favor. They should be certain that such statements are not the result of premeditation, design or effort to inculpate another or to excuse one's self. In 21 Ency. of Law, 111, the rule is thus stated: "Acts or declarations unconsciously associated with and relative to the principal act charged as an offense against the accused from its inception to its consummation and final completion are admissible as

part of the *res gestae;* but declarations made after all actions on the part of the wrongdoer, actual or constructive, has ceased, or declarations made before the commission of the offense and entirely disconnected therewith, are not part of the *res gestae* and should not be admitted." Mr. Wharton in his work on Criminal Evidence, section 262 says: "*Res gestae* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks."

In this case we find that immediately after the shooting, the prisoner ran out of the store where it took place, and then as soon as the witness Johnson satisfied himself that Newcomb was dead, he became frightened and also ran out of the store, and as he did so the prisoner was under a tree near the store "hollering and whooping." The witness went into a lot behind a house on the opposite side of the road and says he remained there about a minute and a half and then gave this account of what took place: "When I was in the lot I was out of sight of the prisoner; *I staid in the lot until I got over my scare or excitement, and thought it over,* and thought I had better go to the festival at the church (which was nearby), and tell the people there about the shooting; when I came out of the lot and talked with the prisoner Wright; it was I suppose not over five minutes after the shooting, it was not long; I was in the lot about a minute and a half; when I came out the prisoner had stopped 'hollering and whooping; he was by himself; he was about twenty-five or thirty yards from me when I came out of the lot and I went straight up to him and had a talk with him (the prisoner) about the shooting of Newcomb, when the prisoner made a statement to witness about the shooting."

Thus we see that the witness had time to get over his "scare or excitement" and to think the matter over. The prisoner had then stopped "hollering and whooping" and according to his own testimony he was going to the festival. He had been on the stand before Johnson was called and after stating he was drunk and that he did not know when the shooting occurred and did not see Newcomb that night, that he knew of, said, "Joe Johnson first told me that I had shot Newcomb; I told him I was sorry; I do not know whether he told me at the festival or along the road as I was going to the festival at the church"; Johnson said he supposed it was not over five minutes

after the shooting when he talked with the prisoner, but however that may have been both Johnson and the prisoner evidently had time for reflection and what was then said between them could only have been a narrative of the events and was not a part of the transaction itself. The prisoner had run out of the store immediately after the shooting, had stopped outside "hollering and whooping," but had been there long enough to stop that noise and, if he is to be believed, he was either at the church festival or on the way there when he had the conversation with Johnson. Evidence of what he then said was clearly not admissible as part of the *res gestae*. It would be a most dangerous practice to admit in evidence a statement made by the prisoner under such circumstances as those disclosed by this record, and one that cannot be sanctioned by this State even if there be any authority for it elsewhere, as contended by the appellant. There being no other exception, the judgment must be affirmed.

Judgment affirmed.

SMITH v. N. B. SOCIETY.

123 N. Y. 85. (1890)

FINCH, J. The facts of this case are unusual and extraordinary. In answer to the plaintiff's demand for the sum payable by the defendant's policy of life insurance the company took upon itself the difficult burden of proving that the assured perpetrated a deliberate fraud, planned upon a broad scale, and accomplished by taking his own life; that his efforts to achieve success failing, and a future of poverty and debt seeming to await him, he determined to secure a large insurance upon his life, appropriate it to the payment of his creditors and the comfort and support of his relatives, and reach the result by suicide. The difficult burden was successfully borne, as the verdict of the jury has determined, and the sole inquiry now is whether the scope and range of the evidence admitted, showing the acts and declarations of the assured, transcended the lawful limit or violated the rules of evidence.

The plaintiff was a creditor of the assured, and stands in the case as the assignee of the policy from the date of its transfer to him. He describes, as a witness, the manner of its acquisition. Tyler owed him about $10,000, and upon demand of payment proposed to secure

the debt by an insurance upon his life. The plaintiff assented. The conversation was in December, 1885, and in pursuance of the agreement made, the policy now sued on was executed in June of the next year. By its terms the defendant constituted Tyler a "benefit member" of the "society," and agreed "to pay Fred H. Smith, creditor, if living, if not, to the heirs at law of said member" the sum insured. The plaintiff, having thus become the owner of the policy, objected on the trial to proof of the acts and declarations of Tyler as incompetent to affect or destroy the policy transferred. The General Term questioned his right, considered as an assignment carrying a vested interest, and rely upon section 18 of the Laws of 1883, under which the defendant company was organized: That section attaches the beneficial interest to the membership, and permits the member to change the payee or beneficiary of the insurance without the latter's consent. Where the right of the payee has no other foundation than the bare intent of the member, revocable at any moment, there can be no vested interest in the named beneficiary any more than in the legatee of a will before it takes effect. But the statute does not prevent a contract between the parties by force of which a vested interest does pass, in which respect the present case differs from Hellenberg v. Dist. No. 1 of I. O. of B. B. (94 N. Y. 580). There the designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and remaining wholly within his control. Here the transfer was a collateral security for an existing debt, and the fact brought to the knowledge of the defendant company which explicitly promised to pay the plaintiff in his character as creditor.

Granting, however, that such was the relation of the parties, we are still of opinion that no material error is shown by the record, since all the evidence to which objection was made came fairly within the *res gestae* and the rule permitting proof of the actual transaction involved in the issue. The limitations upon that rule are easily stated, but often difficult in their application. Those limitations were well described in Tilson v. Terwilliger (56 N. Y. 277). The declarations must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain, and they must harmonize with those facts as to form one transaction. That transaction, the thing done, the fact put in issue, was the fraud, which evidently was not a simple, but a compound and continuous fact, proceeding to its result by consecutive steps and separate acts, having

necessarily an origin, a progress and an ultimate result, involving not only the intent of the assured, but also his sanity, without which the responsible intent could not exist. This fraud, therefore, could be studied and proved all along the line; and in all its stages, from origin to culmination, formed part of the issue to be investigated. If in such a case declarations are excluded which are merely narrative of a past transaction, the residue so far as pertinent to the issue, will generally, and with few exceptions, be admissible in evidence.

It is thus not difficult to decide that the proof of applications by Tyler to thirty-six different insurance companies, by which he secured $282,000 of insurance upon his life, and his letters and telegrams to relatives and friends written and sent as steps or agencies in the consummation of his purpose, and indicating a sane and deliberate intent to consummate the fraud, which for more than a year had been in preparation, by a final act of suicide, were all admissible. But some of the evidence was more remote and approached so near the outside boundaries of the *res gestae* as to require a specific and particular examination.

The defendant was allowed to prove by Henry A. Bowen that, in the summer of 1885, he went, at the request of Tyler, to the latter's friends to raise money for him; that he failed to accomplish the purpose; that, on his return, he had a conversation with Tyler in which he informed him of that failure, in reply to which Tyler said he was a man who must have money, and if he couldn't raise it he would commit suicide. This was a few months before the process of insuring began, and tended to show two things, both of which were pertinent to the issue. It indicated an existing motive for the fraud in the want of money and the failure to obtain it, and the origin and occasion of the alleged suicidal intent. The declaration accompanied and characterized an act which was itself admissible in evidence, for that act indicated the then desperate character of Tyler's financial situation, and the declaration explained the operation and effect of the fact upon his mind, its force and strength as a motive to the fraud, and the presence of a thought or contemplation of suicide in a contingency which did in fact occur. The evidence serves to indicate the origin and motive of the alleged suicidal intent, which grew to be the effective agency of the fraud.

In the same connection the witness was permitted to detail inquiries which Tyler made in Lutkin as to the easiest mode of producing death. These inquiries were rather acts than declarations, and show the

assured in the process of acquiring information to effect easily and swiftly the destruction of his own life.

Similar testimony of an intent to commit suicide rather than endure poverty or hard labor, was given by the witness Trested, but in connection with inquiries about insurance and with an endeavor to get into a benefit society connected with the hat trade. The witness added Tyler's declaration that he intended to put a large insurance upon his life and make the boys happy.

These acts and declarations all occurred before the plaintiff took his policy as collateral, and when they affected no one but Tyler himself. They intended to show the origin and progress of the fraudulent intent, the manner of its growth and the motive from which it sprung. They indicate a sane and deliberate purpose moving steadily to its result, and constitute a part of the history of the fraud. They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance upon his life which he knew he could not continuously maintain. They show the motive of the fraud and mark its progress, and harmonize completely with all which afterward occurred as to constitute, with that, elements of the single transaction, the fraudulent conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestae,* and did not transcend its limits.

Some of this evidence was restricted upon the ground that death by suicide was no defense under the terms of the policy. That is true; but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud.

We think no error was committed in the admission of the evidence upon which the jury acted, and that, after due consideration of the exceptions taken to the charge, the case was fairly submitted for determination upon its facts.

The judgment should be affirmed with consts.

All concur, except ANDREWS, J., not voting.

Judgment affirmed.

COMMONWEALTH v. VAN HORN.

188 Pa. St. 143. (1898)

Argued May 30, 1898. Appeal, No. 162, Jan. T., 1898, by defendant, from judgment of O. & T. Lackawanna Co., Oct. T., 1897, No. 20, on verdict of guilty of murder in the first degree. Before Sterrett, C. J., Green, McCollum, Mitchell, Dean and Fell, JJ. Affirmed.

Mr. Jones, Do you remember the day that Mrs. Westcott's throat was cut? A. Yes, sir. Q. Did you see her that day, did you see her with her throat cut? A. Yes, sir. Q. Go on and tell the court and jury when you first saw her and all about it. A. It was about 8 o'clock in the evening when I was playing a game of hoop-a-hoy and ran by the Nay-Aug barn and I fell and hurt my knee, and I started walking by when I seen Mrs. Westcott come out of the cellar and Mr. Van Horn after her, and I seen Mr. Van Horn jump the fence, and I hear like the sound of wire; and she ran around and went in the house and went upstairs and come down the front, right away; she wasn't half a minute; and as soon as she seen me, I ran right in the gate and she says, 'George Van Horn did it,' and she said, 'Frankie, get a doctor.'"

Counsel for the defendant moved to have the answer stricken out as it was not included in the offer, alleging that he did not have an opportunity to object to it, and he asked to have it stricken out.

By the Court: That is you object to the declaration made by Mrs. Westcott.

Mr. Thayer: Yes, sir.

By the Court: I will consider it now as though it had been made under the offer. I will hear you upon the motion.

Mr. Wedemant: I understand that it is not part of the *res gestae*, and I object to it. We think it is not evidence and we ask to have the answer stricken out.

By the Court: Beddingfield's case was decided by Chief Justice Cockburn trying a case at *nisi prius*, and was the subject of considerable comment at the time. The whole narrative of the case and of its surroundings, and the cross-examination which it evoked, are to be found in the 14th and 15th volumes of the American Law Review. A review of the case is there made by Prof. Thayer, of the law school of the Harvard University, himself a very eminent authority upon the subject of evidence. The result of that review is to call in question the soundness of that decision. The eminent judge by whom

it is made, even the manner of the making of his rulings, is criticized because, without any objection on the part of the defendant's counsel, evidently having some idea of what there was in the case, he stopped a witness of his own motion and excluded the evidence without further discussion. It does not seem to me that this is the law. The common mind certainly accepts a declaration of that kind under the circumstances as carrying the highest character of evidence; it is not only made at the time by the person having the best information, but is strongly persuasive of the truth, and it requires the exercise of a good deal of legal learning and acumen to keep it out? It does not seem to me that the argument upon which it is excluded correctly states the law, and I am justified in that conclusion by the decision of our Supreme Court to which the district attorney has referred me in Com. v. Werntz, 161 Pa. 591. It is true that in that case the question arose a little differently; there the defendant sought to put in those declarations to show that he was not the one who did the deed, but that some one else was; but at the same time the reasoning upon which the Supreme Court says that this was evidence fully established it as evidence, not only to exculpate one but to inculpate another, and that is what is sought to be introduced here. Following that authority and what I believe to be the weight of authority in this country, notwithstanding Beddingfield's case and the cases cited by counsel for the defendant from the Supreme Court of California and Indiana, I will overrule the motion.

Opinion by MR. JUSTICE GREEN, October 17, 1898:

Twenty-fourth and twenty-fifth assignments: these relate to the declarations of the deceased when she was seen just after coming from the cellar, with her throat cut and profusely bleeding. The declarations in question were made by the deceased immediately after she came from the cellar and while the blood was gushing in great quantities from the cut which had just been made across her throat. She was in the act of fleeing from pursuit at the instant when the declarations were made. They were a part of the same transaction. In point of time the declarations immediately followed the cutting, and in point of distance the declarations and the cutting were on the same premises. There could scarcely be any greater propinquity of both time and place. There cannot be a moment's doubt that the declarations were the spontaneous utterances springing out of the transaction itself. We are clearly of opinion that they were competent evidence as part of the *res gestae*.

All the foregoing comments are directly applicable to the present

case. The declaration made to Frank Gehrens, was as follows: he testified: "It was about 8 o'clock in the evening when I was playing a game of hoop-a-hoy, and ran by the Nay-Aug barn; and I fell and hurt my knee; and I started walking by, when I seen Mrs. Wescott come out of the cellar, and Mr. Van Horn after her; and I seen Mr. Van Horn jump the fence. I seen him jump the fence and I heard like the sound of wire, and she ran around and went in the house and went upstairs and came down the front right away; she wasn't half a minute and she came out; as soon as she see me, I ran right in the gate and she says: 'George Van Horn did it;' and she said, 'Frankie, get the doctor,' and I ran after Dr. Burnett." The declaration made to Mrs. Fetterhoff was, "that her throat was cut —that she had been murdered, and that George Van Horn had done it." This was made at the moment she was in the house, as testified by Gehrens. When it is considered that these declarations were made as quickly as they could be made after the occurrence, to the persons to whom they were made, in an immediately succeeding order of events, by the person best qualified to know, and most deeply interested, and in such circumstances as to preclude all idea of premeditation or design, it is manifest that they come exactly within the ruling in the Werntz case and the reasoning there expressed.

Judgment affirmed.

KEYS v. CITY OF CEDAR FALLS.

107 Ia. 509. (1899)

Action at law to recover damages for injuries sustained by plaintiff resulting from a fall into an excavation in one of the streets in defendant city. Trial to a jury and verdict for plaintiff for four thousand five hundred dollars, which was reduced by the court to the sum of three thousand dollars, and defendant appeals. Affirmed.

DEEMER, J. When the plaintiff came back to the mill, which was immediately after his fall, he dropped into a chair, and was sitting there, when one Lemmers, an employe at the mill, discovered him. His hat and coat were covered with dirt, and he had a frightened appearance. Lemmers asked what was the matter, and plaintiff thereupon responded that he had fallen into an excavation and was hurt. Plaintiff, on his examination, was also permitted to testify that, within three minutes

from the time the accident occurred, he told Lemmers and a man by the name of Hanson about what had occurred. All this evidence was objected to, but the objections were overruled. It may be that plaintiff's evidence as to his having told these persons about his having been hurt was irrelevant and immaterial, but, if so, it was without prejudice, for he did no more than say that he told them. Evidence as to what he said to them was not given by the plaintiff. The testimony of Lemmers, if admissible at all, was proper, as part of the *res gestae*. Appellant claims that what plaintiff said was a narrative or statement made after the main transaction was ended, and was therefore inadmissible. It is often difficult to determine when a statement or declaration is a part of the *res gestae*. The rule we have heretofore announced is that, if they are near enough in point of time with the principal transaction to clearly appear to be spontaneous, unpremeditated, and free from sinister motives, and afford a reliable explanation of the principal transaction, they are admissible in evidence. State v. Jones, 64 Iowa, 349; McMurrin v. Rigby, 80 Iowa 322; State v. Driscoll, 72 Iowa 583; Frink v. Coe, 4 G. Greene 555. See, also, Insurance Co. v. Mosely, 8 Wall. 397; Keyser v. Railway Co., 66 Mich. 390 (33 N. W. Rep. 867). We think the declaration made by plaintiff was so connected in point of time and with the main transaction, and came so spontaneously, that it was admissible as part of the *res gestae*. The evidence was clearly competent, as explanatory of plaintiff's appearance as there was no time for him to have invented a false statement. Plaintiff was also permitted to testify, over defendant's objections, that he was compelled to sell out his business because his physical condition was such that he was not able to conduct it. The mere fact that he sold his business was probably immaterial to any inquiry in the case. But the fact that he was unable to attend to his business by reason of his injuries was very material. The statement as to why he sold was but another way of saying that he was unable to carry on or conduct the business in which he was engaged before he received his injuries, and we think it was proper. In any event, the error was without prejudice. Wade v. Leroy, 20 How. 34; Kinney v. Crocker, 18 Wis. 80; Smay v. Etnire, 99 Iowa 149.

No prejudicial error appears, and the judgment is

Affirmed.

SIEBERT v. STATE.

143 Ill. 571. (1892)

Defendants were convicted of murder.

CRAIG, J. The next point relied upon by the defendants to reverse the judgment is, that the court erred in refusing to allow the defendants to prove that the deceased, at different times within a year of his death and prior to his last sickness which resulted in his death, made threats that he intended to take his own life,—that he intended to commit suicide. It will be observed that the declarations offered as evidence were not a part of the *res gestae,* or accompanied by any act of the deceased which they might characterize or explain, but were mere naked declarations offered as original evidence. It is conceded in the argument, and fully established by the evidence that the deceased came to his death from arsenical poisoning, and while it is true that it was a question for the jury to determine, from the evidence, whether the deceased came to his death from poison administered by the defendants, or administered by himself or some other person, yet that question was one which must, like all other issues involved in the trial of a legal proceeding, be settled by legal and competent evidence introduced by the respective parties.

Judgment affirmed.

C. & E. I. R. R. CO. v. CHANCELLOR.

165 Ill. 438. (1897)

This action was brought by appellee, as administrator of the estate of Josephine H. Johnson, deceased, to recover damages from appellant for causing the death of appellee's intestate. The declaration contains two counts.

To the declaration the general issue was filed, and upon a trial by jury a verdict was returned for appellee in the sum of $5000. The trial court entered judgment on this verdict, which judgment, on appeal to the Appellate Court for the First District, was affirmed. Whereupon this appeal was prosecuted to this court.

PHILLIPS, J. The principal error assigned by appellant, and relied on as a reason for reversal of this judgment, is on the admission of

improper evidence by the trial court. Over the objection of appellant a witness, Mrs. Laura Stangnan, was permitted to testify for appellee that she was at the house of Mrs. Johnson between seven and eight o'clock on the morning in question, and that Mrs. Johnson was getting ready to go to the city to get a dress, and that she said she was going on the nine o'clock train because that would take her near to Siegel & Cooper's. At the time this was said she was getting her children ready to go to school. The sole object of this evidence was to show that the decedent intended to become a passenger on appellant's train. This became a material fact in the case, for the reason that if Mrs. Johnson sustained the relation of a passenger at the time of the accident, then appellant was bound to exercise the highest reasonable and practicable degree of care for her safety. (Chicago & Alton R. R. Co. v. Pillsbury, 123 Ill. 9; Chicago & Alton R. Co. v. Arnol, 144 id. 261.) If she did not sustain the relation of a passenger or intended passenger, then only ordinary care was required of appellant. It thus became an important question of fact to be determined whether the decedent sustained the relation of an intended passenger on appellant's train.

The evidence of Mrs. Stangnan, above cited, as to the acts and declarations of decedent, an hour before the accident, was practically all that was relied on by appellee to show her relation as a passenger. To controvert this, it was shown by the only persons in charge of appellant's ticket office that she purchased no ticket and that morning, and after her death those who took immediate charge of her effects found no ticket and only a few pennies in money in her purse; also, that during the thirty minutes she had been at appellant's station one regular passenger train had departed for Chicago and one in the other direction. The question for consideration is, whether this evidence was part of the *res gestae*. If so, it was properly admitted by the trial court, and if not it was error.

Courts have not always found it without difficulty of determination as to whether or not particular acts or declarations were so nearly contemporaneous or co-incident with the act itself as to become part of the *res gestae*. The rule is thus laid down by Greenleaf: "Declarations, to become a part of the *res gestae*, must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the fact which they were intended to explain, and so to harmonize them as obviously to constitute one transaction." Greenl. on Ev. Sec. 108, note 1.

Where the evidence shows the party is about to start on a journey, from common experience we know it is usual and natural that something

is said by the party relating to the departure, and of a character indicative or explanatory. For such declarations to be admissible in evidence as part of the *res gestae* they must be made in connection with an act proven, as in the case above cited. The rule is, that the *res gestae* generally remains with the *locus in quo,* and it does not follow the parties after the principal act is completed. The authorities to which we are cited in argument are principally those in which the declarations sought to be considered were made after the act or injury with which they are attempted to be connected. The rule is, in determining whether or not declarations made before or after the principal act are to be considered as part of the *res gestae,* lapse of time is taken into consideration, and such declarations made after the principal act will not be considered as part of the *res gestae* if there is any change from the place of the occurrence of the principal act or in the condition of the parties. The evident reason of the rule is, that in such event an opportunity for fabrication might be given or testimony might be manufactured by interested parties. Whether or not such act or declarations will be so considered must depend upon the circumstances of each case. The real test is, whether the principal act and the declarations sought to be considered as part of the *res gestae* are separated from each other by such a lapse of time as to render it probable that the parties are speaking from designing purposes rather than instinctive impulse. It can be stated as the general rule, that anything said or done before the principal act occurred or was within the contemplation of the parties cannot be regarded as part of the *res gestae,* although only separate by the least possible span of time, unless it tends to explain and unfold the principal act by the undesigned act or declaration of the party, for the reason that such declaration or act could not be said to throw any light upon the motives of the parties. A person desiring to commit suicide might an hour before the act, declare that he intended to become a passenger upon a train, when, as a matter of fact, no such intention existed in his mind, but the only intention there existing might be to go to a passenger station where trains were passing, for the purpose of taking his own life. Such declaration, therefore, made an hour or any other space of time previous to the act of departure, itself would afford no light upon his intention, and could not be considered as evidence unless immediately connected with the act of departure. In the case at bar, at the time the declarations which were sought to be admitted as evidence were made, the decedent was getting her children ready for school and performing her ordinary household duties, and while so doing she declared an intention of going to the city of Chicago This

declaration was not connected with the act of departure itself, and was not admissible. To admit such declaration as constituting a part of the *res gestae* would, on the same principle, hold admissible a like declaration made a day or a week before. Such declaration therefore, made to the witness Stangnan, was not competent as part of the *res gestae*, and it was error to admit it.

Reversed and remanded.

CONNECTICUT MUTUAL LIFE INS. CO. v. HILLMON.

145 U. S. (1891)

On July 13, 1880, Sallie E. Hillmon, a citizen of Kansas, brought an action against the Mutual Life Insurance Company, a corporation of New York on a policy of insurance dated December 10, 1878, on the life of her husband John W. Hillmon, in the sum of $10,000, payable to her within sixty days after notice and proof of his death. On the same day the plaintiff brought two other actions, the one against the New York Life Insurance Company, a corporation of New York, on two similar policies of life insurance, dated respectively November 30, 1878, and December 10, 1878, for the sum of $5,000 each; and the other against the Connecticut Mutual Life Insurance Company, a corporation of Connecticut, on a similar policy, dated March 4, 1879, for the sum of $5,000.

In each case, the declaration alleged that Hillmon died on March 17, 1879, during the continuance of the policy, but that the defendant, though duly notified of the fact, had refused to pay the amount of the policy, or any part thereof; and the answer denied the death of Hillmon, and alleged that he, before November 30, 1878, conspired to defraud the defendant, procured the issue of all the policies, and afterwards, in March and April, 1879, falsely pretended and represented that Hillmon was dead, and that a dead body which they had procured was his, whereas in reality he was alive and in hiding. The defendants introduced testimony that Frederick Adolph Walters left his home at Fort Madison in the State of Iowa in March, 1878, and was afterwards in Kansas in 1878, and in January and February, 1879; that during that time his family frequently received letters from him, the last of which was written from Wichita; and that he

had not been heard from since March, 1879. The defendants also offered the following evidence:

Elizabeth Rieffenach testified that she was a sister of Frederick Adolph Walters, and lived at Fort Madison; and thereupon, as shown by the bill of exceptions, the following proceedings took place:

"Witness further testified that she had received a letter written from Wichita, Kansas, about the 4th or 5th day of March, 1879, by her brother Frederick Adolph; that the letter was dated at Wichita, and was in the handwriting of her brother; that she had searched for the letter, but could not find the same, it being lost; that she remembered and could state the contents of the letter.

"Thereupon the defendants' counsel asked the question: 'State the contents of the letter.' To which the plaintiff objected, on the ground that the same is incompetent, irrelevant, and hearsay. The objection was sustained and the defendants duly excepted. The following is the letter as stated by the witness:

"Wichita, Kansas,

March 4th or 5th—I don't know—1879.

Dear sister and all: I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends.

Love to all.

"I am truly your brother,

FRED. ADOLPH WALTERS."

Alvina D. Kasten testified that she was twenty-one years of age and resided in Fort Madison; that she was engaged to be married to Frederick Adolph Walters; that she last saw him on March 24, 1878, at Fort Madison; that he left there at that time, and had not returned; that she corresponded regularly with him, and received a letter about every two weeks until March 3, 1879, which was the last time she received a letter from him; that this letter was dated at Wichita, March 1, 1879, and was addressed to her at Fort Madison, and the envelope was postmarked "Wichita, Kansas, March 2, 1879;" and that she had never heard from or seen him since that time.

Defendants put in evidence the envelope with the postmark and address; and thereupon offered to read the letter in evidence. The

plaintiff objected to the reading of the letter, the court sustained the objection, and the defendants excepted.

This letter was dated "Wichita, March 1, 1879, was signed by Walters, and began as follows:

"Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent, besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it."

MR. JUSTICE GRAY delivered the opinion of the court.

There is, however, one question of evidence so important, so fully argued at the bar, and so likely to arise upon another trial, that it is proper to express an opinion upon it.

This question is of the admissibility of the letters written by Walters on the first days of March, 1879, which were offered in evidence by the defendants, and excluded by the court. In order to determine the competency of these letters, it is important to consider the state of the case when they were offered to be read.

The matter chiefly contested at the trial was the death of John W. Hillmon, the insured; and that depended upon the question whether the body found at Crooked Creek on the night of March 18, 1879, was his body, or the body of one Walters.

Much conflicting evidence had been introduced as to the identity of the body. The plaintiff had also introduced evidence that Hillmon and one Brown left Wichita in Kansas in or about March 5, 1879, and traveled together through Southern Kansas in search of a site for a cattle ranch, and that on the night of March 18, while they were in camp at Crooked Creek, Hillmon was accidentally killed, and that his body was taken thence and buried. The defendants had introduced evidence, without objection, that Walters left his home and his betrothed in Iowa, in March, 1878, and was afterwards in

Kansas until March, 1879; that during that time he corresponded regularly with his family and his betrothed; that the last letters received from him were one received by his betrothed on March 3, and postmarked at Wichita March 2, and one received by his sister about March 4 or 5, and dated at Wichita a day or two before; and that he had not been heard from since.

The evidence that Walters was at Wichita on or before March 5, and had not been heard from since, together with the evidence to identify as his the body found at Crooked Creek on March 18, tended to show that he went from Wichita to Crooked Creek between those dates. Evidence that just before March 5 he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon. Letters from him to his family and betrothed were the natural, if not the only attainable evidence of his intention.

The position, taken at the bar, that the letters were competent evidence within the rule stated in Nicholls v. Webb, 8 Wheat. 326, 337, as memoranda made in the ordinary course of business, cannot be maintained, for they were clearly not such.

But upon another ground suggested they should have been admitted. A man's sate of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

ROESNER v. DARRAH.

65 Kan. 599. (1902)

DOSTER, C. J. This was an action for damages for alienating the affections of a wife and for her seduction. A verdict and judgment were rendered for defendant. The errors claimed are the admission and the rejection of evidence and the giving of instructions. As to the latter, exceptions were not preserved; hence, the instructions cannot be reviewed.

The plaintiff offered his own testimony as to the defendant's visits to his home, as to his wife's apparent change of attitude and feeling toward him after she became acquainted with defendant, and as to statements made to him by defendant concerning the latter's conduct with the wife. All this was rejected, on the ground that the plaintiff, as the husband, was incompetent to testify to matters involving his wife, notwithstanding the latter was not a party to the case. The defendant below, the defendant in error here, places a literal construction on section 323 of the civil code (Gen. Stat. 1901, sec. 4771), which reads: "The following persons shall be incompetent to testify: * * * Third, husband and wife, for or against each other," etc. He says that this statute does not merely disqualify husbands and wives from testifying for or against each others' claims to the subject-matter in litigation, but disqualifies them as well from testifying to each others' personal character, conduct, status, or other

matter in interest, whether they be parties to the litigation or not, and whether the judgment rendered would put the character, conduct, status or matter in interest in the category of *res judicata* or not. In other words, the contention is that, inasmuch as the litigation involved the subject of the wife's fidelity to the husband, and inasmuch as she, though not a party litigant, was incompetent to testify for or against him, he, though a party, was equally incompetent to testify against her.

This contention derives support from some of the decisions, a principal one of which is Cornelius v. Hamby, 150 Pa. St. 359, 24 At. 515. It was there held, in a case of the character of this one, that a husband was incompetent to testify to the adultery of his wife, although she was not a party to the suit. That holding was made under a statute like ours. It may be that the decision was satisfactorily reasoned, so far as that one statute was concerned, but in this state we have in addition to such a statute, another one of material significance. Section 319 of the civil code (Gen. Stat. 1901 sec. 4767) reads: "No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise," etc.

This statute abrogates the common-law rule of disqualification to testify because of interest, and except as limited by other statutes *in pari materia* makes every person competent to give evidence in any case. The limitation contained in the third subdivision of section 323 of the civil code, *supra*, does not apply in such a case as this. That applies only to prohibit a husband or wife, when not a party to the suit, from testifying for or against the other one who is a party; not to prohibit the one who is a party from testifying for or against the other one who is not. This statement of the general rule is not intended, of course, to be inclusive of those exceptions which the statute itself makes, and which exist in that part of it not quoted above.

The language of the opinion in Higbee v. McMillan, 18 Kan. 133, while not having relation to a state of facts identical with those in this case, nevertheless declares a principle applicable to the general question, and definitely and positively settles the rule against the contention of the defendant in error. See, also, Van Fleet v. Stout, 44 Kan. 523, 24 Pac. 960. In thus holding the husband competent to testify against his wife, it must not be assumed that he can testify to transactions or communications had with her. Such character of

testimony is forbidden by the last clause of the third subdivision of said section 323.

The plaintiff offered witnesses to prove the declarations of the wife as to the state of her feelings toward both her husband and the defendant. Some of these offered declarations were made at times before the alleged seduction, and some were made afterward. They were all excluded. A question may exist as to the admissibility of such declarations if made subsequently to the guilty intimacy, but we think none can reasonably exist as to declarations made antecedently to it. The general rule is that, when the inquiry involves the existence of a bodily or mental state, the declarations of the party, when under the influence of the physical or mental feeling in question and disclosing his subjection to it, are not hearsay, but original evidence. (Greenl. Ev. sec. 102.) This rule applies in actions of the character of this one. (Gilchrist v. Bale, 8 Watts. (Pa.), 355; 340 Am. Dec. 469; Edgell v. Francis, 66 Mich. 303, 33 N. W. 501.)

Other claims of error are made, some of which are subsidiary to, and connected with, those above discussed and therefore need not be specially noticed. Others, however, are of a different character, but will not be dwelt upon. It was not error to permit the defendant to testify to his motive in inviting plaintiff's wife to visit at his home. It was, however, error to admit evidence of declarations made by plaintiff's wife, that she had to work hard and get no credit for it, and that she was homesick and intended returning to the place from where she came. Declarations of such character do not disclose a mental state forming a pertinent subject of inquiry, and, therefore, are governed by a different rule. It was also error to admit evidence of plaintiff's requiring his wife to assist in the breeding of animals, and to permit witnesses to detail conversations with plaintiff about lawsuits in Nebraska, and about his being subjected to the visits or threats of "whitecaps" in Missouri. These topics were irrelevant to the meritorious subject of inquiry, and would naturally tend to prejudice the plaintiff's cause before the jury.

The judgment of the court below is reversed and a new trial ordered.

All the Justices concurring.

IN RE DANIEL BURNS' WILL.

121 N. C. (1897)

FAIRCLOTH, J. The issue was *devisavit vel non*. Daniel Burns, aged 75 or 80 years, died in 1893, leaving eight children him surviving. He also left a last will, dated in 1889, in which he devised and bequeathed his entire property to his son, Phil. F. Burns.

Numerous witnesses were examined at the trial, the evidence of some of them tending to prove sanity, and that of others to prove insanity. The evidence consisted of the opinion of witnesses, the conduct and language of the testator at different times, from a time recently before the date of the will running back to about the close of the late war, when he received a severe blow on his head.

It is not denied that declarations of the testator made at the time of signing the will are competent. They are a part of the *res gestae*. 1 Thomas Coke 761, 763, 763n. The declarations and conduct of the testator, both before and after he signed the will, are competent as to the condition of his mind at the time he signed it. They are the pointers of the controlling fact involved in the issue to be submitted to the judgment and discretion of the jury as rational men. These acts and declarations are not received as a part of the *res gestae* but whether made long before or after making the will is immaterial as to their competency. They are circumstances uttered by one having an interest, going to the jury with such weight and credit as that tribunal may give them, whose province it is to try the facts and also to pass upon the truth of these circumstances.

Error.

MONTGOMERY, J., dissents.

LANE v. MOORE.

151 Mass. (1890)

Tort, by the administrator of the estate of Nathan W. Fellows, for the conversion of a promissory note.

C. ALLEN, J. The only question argued is as to the competency of the declarations made by the plaintiff's intestate after the time of the alleged gift to the defendant. Where the mental condition of a

person at a particular time is in issue, his appearance, conduct, acts, and declarations, after as well as before the time in question, have been held admissible in evidence if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was. The question has usually arisen in cases involving the validity of wills, but the principle is the same where the validity of a gift is questioned, and where responsiblity for crime is to be determined, Thailer v. Bumstead, 99 Mass. 112, 122, 123. Lewis v. Mason, 109 Mass. 169. May v. Bradlee, 127 Mass. 414, 420. Potter v. Baldwin, 133 Mass. 427, 429. Whitney v. Wheeler, 116 Mass. 490. Commonwealth v. Pomeroy, 117 Mass. 143, 148. Commonwealth v. Damon, 136 Mass. 441, 448. So where the question was whether a testator by cancelling a will intended to revive a former will, it was considered that his subsequent declarations were competent for the purpose of showing what his intention was. Pickens v. Davis, 134 Mass. 252, 257, 258, and cases there cited. In all such cases, the evidence is received merely for the purpose of throwing light upon the state of mind of the person at the time in question, and not as tending to establish the truth of any facts which may have been stated by him.

There are certain proper limitations to the admissibility of such evidence. One is, that the matters testified of should be sufficiently near in point of time, so that the testimony may be of value in determining the question which is directly in issue. Another proper limitation is, that the testimony should appear to have some natural bearing upon the mental condition of the person, or his intention at the particular time which is immediately involved in the issue.

In the present case, it is impossible to say that the judge has misapplied any rule of law. There was enough evidence of an impairment of the mental faculties of the plaintiff's intestate, before and at the time of the alleged gift to the defendant, to warrant the introduction of evidence as to his condition afterwards.

Exceptions overruled.

ELMER v. FESSENDEN.

151 Mass. 359. (1890)

Tort for slander. The declaration alleged that the defendant, who was a physician, falsely informed certain employees of the plaintiff,

who was a manufacturer of whip-snaps from silk thread, that the silk thread which was furnished them by the plaintiff, and which they were compelled to manipulate in their work, contained arsenic, as a result of which information they ceased to work for the plaintiff; and that the plaintiff had suffered in the loss of their services certain specified damage in his business. The answer contained a general denial, and also alleged that whatever words were spoken were privileged. Trial was in the Superior Court before Barker, J. who allowed a bill of exceptions in substance as follows:

"The plaintiff introduced evidence tending to show that he was, during 1887, a manufacturer of whip-snaps from silk thread in Ashfield, which thread his employees there resident were compelled to manipulate; and that in the month of June, 1887, the defendant, who was a physician in that town, had circulated the report that he had sent some of the silk thread used in the manufacture to the state board of health for analysis, and received from that board a report that it contained arsenic in sufficient quantities to be dangerous to the employees using it in the way they did. The witness who testified to these facts had also testified that he was, and had been from March, 1887, the agent of the plaintiff who superintended this business, and he was permitted—on the assurance of the plaintiff's counsel that he expected to prove later that certain of the employees, for the loss of whose services damages were specified in the declaration, had stopped work by reason of the statement of the defendant to them above referred to relative to the report of the board of health—to testify that these employees stopped work on the 11th day of June, 1887, for some time. The plaintiff then, to prove the reason why they stopped work, asked the witness whether they gave any reason for stopping work. This question was excluded by the court. The plaintiff afterwards asked, 'What, if anything, did they say as the reason for stopping?' This question the court also excluded."

Afterwards the plaintiff called as a witness Anna M. Brackett, of Ashfield, who testified that she was, in June, 1887 in the employment of the plaintiff; and that in the first part of that month she stopped making as many whip-snaps as before because she heard there was poison in the silk. She was then asked by the plaintiff from whom she heard this, and she said she could not remember. Thereupon the plaintiff's counsel, after stating to the judge that the plaintiff could not identify the person repeating this report to her, or produce any further evidence that it originated from the defendant, except evidence that the defendant had circulated identical statements, and that

the informant of the witness stated to her that the report came from the defendant, further inquired of her, "What was the report which you heard in June, 1887, which caused you, as you have testified, to make a less number of whip-snaps?" This question the judges excluded. The further question was then asked her by the plaintiff, "From whom was the report stated to you to have come, if from any one?" This question, the judge also excluded.

There was evidence tending to show that the question whether there was arsenic in the silk had been a matter of discussion among the plaintiff's employees and in the community in Ashfield since the preceding February; that several of the employees had received medical advice that there was arsenic in it, but their work had not fallen off before June 1; and that in fact there was no arsenic in the silk.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

HOLMES, J. It was a part of the plaintiff's case that the cause of his workmen leaving his employment was the defendant's false story. If, as may be assumed, the excluded testimony would have shown that the workmen when they left gave as their reason to the superintendent that the defendant had told them that the board of health reported arsenic in the silk, the evidence was admissible to show that their belief in the presence of poison was their reason in fact. Lund v. Tyngsborough, 9 Cush. 36, 41, 43. Aveson v. Kinnaird, 6 East 188, 193. Hadley v. Carter, 8 N. H. 40, 43. United States v. Penn, 13 Bankr. Reg. 464, 467. We cannot follow the ruling at *nisi prius* in Tilk v. Parsons, 2 C. & P. 201, that the testimony of the persons concerned is the only evidence to prove their motives. We rather agree with Mr. Starkie, that such declarations made with no apparent motive for misstatements may be better evidence of the maker's state of mind at the time, than the subsequent testimony of the same persons. Stark. Ev. (10th Am. ed.) 89.

As a rule such declarations are not evidence of the past facts which they may recite. The cases in which they have been admitted to prove the cause of a wound or injury, when the declarations were made at the time, or immediately after the event, if not exceptions to the general rule, at least mark the limit of admissibility. Commonwealth v. Hackett, 2 Allen 136, 140. Commonwealth v. M'Pike, 3 Cush. 181, 184. Insurance Co. v. Mosely, 8 Wall. 397. The excluded testimony was not competent to prove that the defendant did tell the workmen the story. As to that, it was mere hearsay, and was not within the scope of the special reasons which led to the de-

cisions last cited. Roose v. Boston Loan Co., 132 Mass. 439. Chapin v. Marlborough, 9 Gray 244. Bacon v. Charlton, 7 Cush. 581, 586. Aveson v. Kinnaird, 6 East 188. People v. Thornton, 74 Calif. 482, 486. It is admitted, however, that there was independent testimony that the defendant spoke to the workmen, and therefore the exceptions must be sustained.

Exceptions sustained.

INNESS v. RAILROAD CO.

168 Mass. 432. (1897)

Tort, under Pub. Sts. c. 112, sec. 212, for causing the death of the plaintiff's intestate, as passenger, by the gross negligence of the defendant's servants. Trial in the Superior Court, before Maynard, J., who, at the close of the evidence, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

HOLMES, J. There was evidence that the intestate had just gone up the steps and reached the platform of a car, when the train of which the car was a part, and which had been delayed by snow, was run into by a later train, and he was thrown off and killed. The question argued is whether there was any evidence that he was a passenger at the time. The train upon which, according to the evidence mentioned, he had just entered, was bound for Boston, his destination. It was at rest, and of course, if he had reached the platform on his way into the car he had got far enough to have the right of a passenger, so far as his position is concerned. But it is urged that his general practice was to travel by a street railway, and that, on the evidence properly admitted, it is as likely that he was crossing the platform on his way to the electric cars as that he intended to go by steam. It also is argued that, as it does not appear that he had a ticket or the money to pay for one, it does not appear that he had the rights of a passenger whatever his intent.

At the time of the accident, no electric cars were running because of a snow storm. There was testimony that the street railway could be seen from the intestate's house, and that less than a quarter of an hour before the accident the intestate looked out in the way he always did to see if the electric cars were there, and then left in a

hurry saying that he was going to take the train, as there were no electric cars running. The admission of this statement was excepted to, but was proper. If either his intent or his belief that no electric cars were running was material, his statement at a moment when he had no interest to make evidence was admissible to show the state of his mind, within the established exception to the rule against hearsay. Commonwealth v. Trefethern, 157 Mass. 180. Clearly his belief, especially when shown to have been correct, was material, as it would have the taking of the steam cars for its natural consequence, and so would show the probable intent with which he got upon them. His intent so shortly before the act to be interpreted, being in accord with what was to be expected from his belief, also was admissible, and might have been presumed to continue, as indeed it might have been found to exist without direct evidence.

Exceptions sustained.

CHICAGO & ALTON R. R. CO v. MAHON AND HUNT.

42 Ill. 158. (1866)

This was an action of trespass on the case, brought in the court below by Mahan & Hunt against the Chicago and Alton Railroad Company, in which the plaintiffs recovered. The defendant took this appeal. The opinion of the court contains a statement of the case.

LAWRENCE, J. This action was brought by Mahan & Hunt against the railway company to recover the value of goods destroyed by fire communicated from the locomotive. One of the questions made upon the trial was whether the goods belonged to Mahan & Hunt, or to Hunt singly. In order to prove the joint ownership, the plaintiffs were permitted to introduce in evidence the declarations of the plaintiffs as to their partnership. The defendants then offered the record of a suit brought by Hunt alone against the company to recover the value of these goods. The evidence was not admitted. This was error. The record was proper evidence as against Hunt, and in rebuttal of his declarations as to the fact of partnership. It was an admission by Hunt that there was no partnership, or claim by him that he was the sole owner of the goods, and, although this could not prejudice the rights of Mahan, if he was really a partner, yet it was competent evidence to go to the jury, on this issue, so far as the

plaintiffs had been permitted to prove the declarations of Hunt, in their own favor. If the plaintiffs could prove the declarations of Hunt to the effect that there was a partnership, the defendant should certainly be permitted to prove his declarations that there was not.

Judgment reversed.

ILLINOIS CENTRAL R. R. CO. v. SUTTON.

42 Ill. 438. (1866)

This was an action of trespass on the case, instituted by the appellee, in the court below, against the appellant, as a common carrier, for the ejecting of the appellee, who was a passenger, from the cars of the appellant.

Damages claimed $10,000. Plea, the general issue.

At the October Term, 1866, of the Champaign Circuit Court, the cause was tried before a jury, who found the defendant guilty, and assessed the plaintiff's damages at $470, besides the costs of suit. A motion for a new trial was made, which the court overruled, and thereupon rendered judgment upon the verdict. Whereupon the defendant prayed an appeal to this court. The points in the case upon which error is assigned are fully stated in the opinion of the court.

LAWRENCE, J. This case, in its essential features, is like that of the Chicago & Alton R. R. Co. v. Flagg, decided at the present term. We held, in that case, when a railway company carries passengers in a car attached to a freight train, and adopts a regulation requiring tickets to be purchased before entering the train, and a passenger disregards the rule, he can only be expelled from the train at a regular station. It is urged that this provision of the statute, forbidding passengers to be elsewhere expelled applies only to the case of refusal to pay the fare and not to a violation of any other reasonable rule. But the willful neglect to buy a ticket at the time and place required by the rules, and the refusal to pay the fare, are substantially the same offense against the rights of the road, and the former can be visited by no heavier penalty than the latter. But in this case, as in the other above referred to, there was no satisfactory proof that the plaintiff was cognizant of the rule, and he offered to pay his fare to the conductor, who refused to receive it, and compelled him to leave the train at some distance from a station. He was, indeed, informed

of the rule just before the train started, and then sought to buy a ticket, but the office was closed. Under these circumstances he was clearly entitled to his action.

Plaintiff claims to have been suffering from disease, and that it was aggravated by the walk incident to his expulsion from the cars. To prove this, a physician was examined, who testified he visited the plaintiff and found him suffering much pain; that he had been attending him for two years, and had cautioned him against severe exercise, and that the plaintiff informed him that his present condition was caused by overexertion in walking. The defendant moved the court to exclude so much of this evidence as related to what the plaintiff said of the cause of his condition. This the court refused to do, and in this decision there is error. A physician, when asked to give his opinion as to the cause of a patient's condition at a particular time, must necessarily, in forming his opinion, be, to some extent, guided by what the sick person may have told him, in detailing his pains and sufferings. This is unavoidable, and not only the opinion of the expert founded in part upon such data, is receivable in evidence, but he may state what his patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestae*. But to permit a party to prove what he himself stated to his physician, not in regard to the character of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its origin in necessity, to a most dangerous extent. State of Vermont v. Davidson, 30 Vt. 377.

The propriety of enforcing this rule in the present case is manifest from a careful consideration of the evidence. The physician was asked as to his professional opinion of the cause of the plaintiff's illness. This opinion he gives nowhere in his testimony, but, instead thereof, he states that the plaintiff said his sickness was caused by over-exercise in walking. True, the physician says he had cautioned the plaintiff against over-exercise in walking, and that walking would injure him, but he does not give his professional opinion, that the illness, which confined the plaintiff for several weeks, was due specifically to that cause, although that impression is allowed to be made upon the minds of the jury. It seems to us not impossible the physician may have been unwilling to state, as his own belief, that the plaintiff's long confinement was due to the walk taken by him after having been expelled from the railway train. That expulsion occurred

only between one and two miles from the station. It appears in the testimony that plaintiff "was walking about the premises," while waiting for the train at the station. He was engaged in the tin and hardware business, and two of his witnesses swear his time was worth fifty dollars per day. If that was true he must have been leading a life of great activity. We can well see, therefore, that the physician may have been in doubt as to whether the walk of that day caused his illness, and whether in doubt or not he should not have been permitted, against the objection of the defendant, to give the jury the statement of the plaintiff in lieu of his own professional opinion. It is urged by counsel for appellee, that the fact of his having been obliged to walk from one to two miles is proved by other witnesses. That is true, but the question was, whether his illness was attributable to that walk, and on that point the only direct evidence in the record was the statement of the plaintiff himself. Perhaps the jury would have presumed this from the fact, that the illness immediately followed the walk, and from the statement of the physician, that the plaintiff had for a long time been suffering from a disease which would be aggravated by severe exercise. But we cannot tell how far the jury may have been influenced in fixing the damages by this statement of the plaintiff, given to them through the physician, and, as it was illegal evidence, we must reverse the judgment, and remand the cause for another trial.

Judgment reversed.

STATE OF VERMONT v. DAVIDSON.

30 Vt. 377. (1858)

Indictment in three counts for highway robbery, and assault with intent to rob, and assault with intent to kill, respectively, upon the person of Michael Baldwin.

The jury returned a general verdict of guilty.

REDFIELD, Ch. J. The first question is in regard to the admission of the statement of Baldwin, at the time he was first discovered by the witnesses.

It is well settled that the declarations of a party, injured when no one is present, are not evidence to show the manner in which the injury occurred however nearly contemporaneous with the occurrenee.

Such declarations do not tend to characterize the transaction, and are, by consequence, no part of it, and cannot be admitted as such. This has been decided in this State with reference to injuries upon the highway when no one was present who could be a witness.

The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect, but they are not admitted as part of the *res gestae.*

Hence it clearly would not have been competent to show that Baldwin said, when first discovered, that he had been robbed, or that he had been robbed by the respondent, although undoubtedly such a statement would have some effect in convincing the jury that such was the fact. But it is merely hearsay, and depends for its force wholly upon the veracity of the speaker and the circumstances under which it was uttered. And it does not tend to characterize any act of the party speaking.

The testimony objected to in the present case was simply an inquiry in other words, if the witnesses had seen the respondent, and it is relied upon as equivalent to a declaration that Davidson had robbed him. It is indeed of less force than that, and is clearly inadmissible, upon the question of proving the *corpus delicti* towards proving which it seems to have gone to the jury.

Can this be received as part of the *res gestae,* which means, as part of the transaction? Of what transaction, it may be inquired? The transaction of the robbery, upon the theory of the government, was fully completed some time before this declaration was made. There was no transaction then in progress, of which this declaration could form a part, unless it was the pursuit of the respondent by Baldwin. And it is difficult to see how that had any tendency to show that a robbery had been committed, however it might bear upon the question whether the respondent was the party whose agency had produced the injury, whatever it was. There seems to have been no great question that the respondent was the only party who had been with Baldwin after he was last seen a few rods east of the point where he was then found. And if the injuries of Baldwin were not accidental, of which there seems no great probability, from the testimony detailed, it may be said there was not much question that the respondent had some agency in their production. But we do not perceive that the fact that Baldwin was pursuing the respondent tended to show that the case was one of robbery rather than of conflict.

Baldwin would have been about as likely to pursue him in the one case as the other.

The mere fact of pursuit is not then competent evidence to prove the robbery, to which end it was suffered to go to the jury, notwithstanding the remonstrances of the respondent's counsel.

For so long as it is supposable that the injury may have happened by accident or possibly by other hands, the mere pursuit may have been to overtake the respondent as a friend to gain relief. The pursuit of the respondent by Baldwin, being then consistent with more than one theory of the production of the injury, the fact does not tend to prove the case charged in the indictment. The *corpus delicti* must be assumed to be proved before the pursuit becomes of any importance, and, the testimony having been objected to, and no instruction being given as to its effect, it possibly might have been viewed by the jury as possessing some intrinsic importance, from the mere fact that it was ruled in, notwithstanding objection, which otherwise it would not have had in their minds. And as it went into the case and was left to the jury as tending to prove the *corpus delicti*, it is impossible to maintain its competency. And we do not decide that it had any legal tendency to identify the guilty party. But if it were confined to that point and that were the only difficulty, I could, I think, make it a circumstance of some slight weight, and legitimately entitled to be considered if left to the jury upon that point only.

Verdict set aside and new trial granted.

LAKE STREET EL. R. R. CO. v. SHAW.

203 Ill. 39. (1903)

This is an action on the case, brought by the appellee in the Circuit Court of Cook county against the appellant, to recover damages for a personal injury alleged to have been sustained by her in consequence of the negligence of the appellant.

The appellant filed the general issue, and upon the trial the jury returned a verdict in favor of appellee for $5,000, upon which verdict, after overruling a motion for a new trial, the court rendered judgment, which judgment was affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

HAND, J. It is first contended that the court erred in declining to

take the case from the jury upon the motion of the appellant, made at the close of all the evidence, on the ground that there was a variance between the proof and the declaration.

It is further contended that the court erred in admitting improper evidence on behalf of appellee. Mary T. Fitzgerald, a servant of appellee, was called as a witness. After stating she saw appellee upon the evening on which she was injured, she was asked: "What did you notice about her?" to which she replied: "I saw that her knee was bruised,—the right knee and the hip. She complained of a pain in her right hip that way, and her face;" and after stating that the appellee was confined to her bed for five weeks, she was asked, "What did you notice about her during the five weeks?" to which she replied, "She complained of pain very much all the time." The appellant moved to strike out of the answer to the first question the words "she complained of pain in the right hip," and the entire answer to the second question, but the court denied the motion and allowed both answers as given to stand. There was a conflict in the evidence as to the extent and character of the injury sustained by appellee. The appellee claimed she sustained a severe injury to the right hip, while two physicians (one her family physician) who saw her on the evening after the injury, testified that it was her left side that was injured and that her right hip was not injured, but that her right hip was subsequently injured by a fall upon the sidewalk. To permit the witness Fitzgerald to testify that "she complained of pain in her right hip," and "she complained of pain very much all the time," was in effect, to permit the witness to give hearsay evidence and the appellee to make evidence for herself (Illinois Central Railroad Co. v. Sutton, 42 Ill. 438; West Chicago Street Railroad Co. v. Carr, 170 id. 478; West Chicago Street Railroad Co. v. Kennelly, id. 508; Springfield Consolidated Railway Co. v. Hoefner, 175 id. 634); and in view of the conflicting evidence was reversible error. In Springfield Consolidated Railway Co. v. Hoeffner, *supra,* it was said (p. 643) referring to the Carr and Kennelly cases: "The rule laid down in these cases is, that declarations as to the pain and suffering of the injured party, when made by such party, are only competent if made at the time of the injury, so as to constitute a part of the *res gestæ,* or when made to a physician during treatment."

Reversed and remanded.

ROOSA v. BOSTON LOAN CO.

132 Mass. 439. (1882)

Tort for assault and battery. At the trial in the Superior Court, before Brigham, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

ENDICOTT, J. When the bodily or mental feelings of a party are to be proved, his exclamations or expressions indicating present pain or malady are competent evidence; and in Bacon v. Charlton & Cush. 581, 586, where this rule is stated, it was said by the court: "Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady." The opinion closes with this precaution: "These remarks as to the limitation of the rules are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable."

In Chapin v. Marlborough, 9 Gray 244, it was held, on the authority of Bacon v. Charlton, that a physician could not testify to a statement made by the plaintiff, that his leg had been struck by a horse. And in Barber v. Merriam, 11 Allen 322, the question arose, whether the plaintiff's statements to her physician, made after the suit was brought, as to the character and seat of her injuries and sensations, were competent. The only point decided was, that such statements to her medical adviser, as to the character and seat of her injuries and sensations, were admissible. Aveson v. Kinnaird, 6 East 188, 195, and the Gardner Peerage Case, 78, 172, 175, are cited as authorities, where the statements of a patient to a physician of symptoms and complaints are held to be competent evidence.

In Illinois Central Railroad v. Sutton, 42 Ill. 438, the plaintiff was ejected from a train. He contended that he had been suffering from disease, and that it was aggravated by the walk which he was obliged to take by reason of his expulsion. His physician testified as to his condition, and also that he was informed by the plaintiff that his present condition was caused by over-exertion in walking. The court held that the statements of a patient to a physician of his pain and suffering, and in regard to his bodily condition, are competent to enable him to form an opinion as to the extent and nature

of his injuries; but that it was not competent for the physician to testify to the plaintiff's statements as to the specific cause of the injury, that being one of the issues before the jury.

The facts in that case, as in Chapin v. Marlborough, are similar to those recited in this bill of exceptions. The plaintiff here testified that she was struck in the stomach by the defendant's servant. The physician in answer to the question, "What did the plaintiff tell you about her condition? replied, "She stated that she had received a blow in the stomach." It would clearly have been competent for a physician, after having testified to the condition of the plaintiff, and to the complaints and symptoms of pain and suffering stated by her, to have given his opinion that they were such as might have been expected to follow the infliction of a severe blow. Such evidence was admitted without objection. But it was not competent for the physician to testify to her statement that she had received a blow in the stomach.

While a witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages, be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject-matter of inquiry, and which may be proved by other evidence.

Exceptions sustained.

A. T. & S. F. R. R. CO. v. JOHNS.

36 Kan. 769 (1887)

Action brought by Mary Johns against The Atchison, Topeka & Santa Fe Railroad Company, to recover damages for injuries received by her while standing on the railroad company's station platform at Severy, in Greenwood county, by reason of being struck and thrown down by the company's servants in removing a trunk from

the platform to the baggage-car of a train then standing at the station. The general verdict of the jury read as follows:

"We the jury in the above-entitled cause, do find for the plaintiff, and we assess her damages at the sum of four thousand dollars."

VALENTINE, J. The first question to be considered in this court is, whether the plaintiff below introduced sufficient evidence to authorize the jury to find in her favor with reference to every essential fact constituting her cause of action.

The plaintiff in error, defendant below, also claims that the court below committed material error in permitting the following evidence to be introduced, to wit: Mrs. M. D. Thatcher was permitted to testify, over the objections of the defendant, among other things, as follows:

"Well, I only know what Mrs. Johns has told me of her suffering, and I have been called in there as a neighbor. She complained of the misery in her side, and she told me that she suffered a great deal with a numbness and a tingling sensation in her left side, I believe it was; and the other evening I was called over there, and she told me that she was suffering now a great deal with that feeling, and also a depression about her heart, she said, in her left side, and she had sent for the physician, I believe, that evening; and that was some of the symptoms, I believe, that she had; of some kind of depression about her heart, a smothering, I think. * * * Mrs Johns has complained of her limb and her foot to me."

Joseph H. Pitzer was permitted to testify, over the objection of the defendant, among other things, as follows:

"Q. Now, Mr. Pitzer, state to the jury what facts you may know with reference to her condition, with reference to her suffering and bodily pain and mental distress. A. I don't know anything, only what she has told me herself.

"Q. What have you heard her say about it? Of what has she complained? A. She has told me frequently that she has suffered. She complained of her head and leg, having a great misery in it. She complained of misery in her side and hip."

On cross-examination he testified, among other things as follows:

"Q. All you know about her suffering and pains since the injury, is what she has told you, is it not, Mr. Pitzer? A. That is all, sir."

We think it is well settled that it is incompetent to prove the declarations of an injured party, or of a party suffering from some cause, made after the injury has happened or after the cause of his suffering has occurred, with regard to the facts of the injury or the cause

of his suffering. (Roosa v. Boston Loan Co., 132 Mass. 43; Morrissey v. Ingham, 111 id. 63; I. C. R. R. Co. v. Sutton, 42 Ill. 438; Collins v. Waters, 54 id. 485; Denton v. The State, 1 Swan. (Tenn.) 279; Spatz v. Lyons, 55 Barb. 476.) And even proof of the declaration of a party, with regard to past suffering or pain, or past conditions of body or mind, is not competent. (G. R. & I. Rld. Co. v. Huntly, 38 Mich. 537; Lush v. McDaniel, 13 Ired. 485; Reed v. N. Y. C. Railroad Co., 45 N. Y. 574; Rogers v. Crain, 30 Tex. 284; Chapin v. Inhabitants of Marlborough, 75 Mass. 244; Rowell v. City of Lowell, 77 id. 420; Emerson v. Lowell Gas Light Co., 88 id. 146; Inhag. of Ashland v. Inhab. of Marlbor., 99 id. 48; Ins. Co. v. Mosely, 75 U. S. 397, 405.)

There are probably no authorities opposed to these propositions, and yet there are authorities which seem almost to oppose the last one, especially where the declarations are made to a physician or surgeon while he is examining the party as a patient. (Quaife v. C. & N. W. Ry. Co., 48 Wis. 513; same case, 33 Am. Rep. 821; Barger v. Merriam, 93 Mass. 322; Fay v. Harlan, 128 id. 244; Gray v. McLaughlin, 26 Iowa 279; Matteson v. N. Y. C. R. R. Co., 35 N. Y. 487; L. N. A. & C. Rly. v. Falvey, 104 Ind. 409; same case, 23 Am. & Eng. Rld. Cases, 522; same case, 22 Cent. L. J. 322.) Declarations, however of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind may generally be shown by any person who has heard them. (Ins. Co. v. Mosely, 75 U. S. 397; Hatch v. Fuller, 131 Mass. 574; Denton v. State, 1 Swan. (Tenn.) 279; I. C. R. R. Co. v. Sutton, 42 Ill. 438; Collins v. Waters, 54 id. 485; L. N. A. & C. Rld. Co. v. Falvey, 104 Ind. 409; same case, 23 Am. & Eng. Rld. Cases, 522; same case, 22 Cent. L. J. 322; 1 Greenl. Ev. sec. 102, and cases there cited; 1 Wharton Ev. sec. 268, and cases there cited.) There are authorities seemingly opposed to this last proposition: Reed v. N. Y. C. Rld. Co., 45 N. Y. 574; C. R. & I. Rld. Co. v. Huntley, 38 Mich. 537.

We think, however, that whenever evidence is introduced tending to show a real injury or a real cause for suffering or pain, as in this case, the declarations of the party concerning such suffering or pain while it exists and as simply making known an existing fact, should be allowed to go to the jury for what they are worth, and the jury in such a case should be allowed to weigh them and to determine their value. If they were made to a physician or surgeon while he was examining the party as a patient, for the purpose of medical or

professional treatment and for that purpose only, the declarations would be of great value. If, however, they were made at any other time or under any other circumstances, they might not be of such great value. If made casually to some person not a physician, and with whom the party had no particular relations, they might possibly in some cases be of but very little or no value. (Reed v. N. Y. C. R. R. Co., 45 N. Y. 574.) Yet generally they should be permitted to go to the jury for what they are worth. (Ins. Co. v. Mosely, 75 U. S. 397; Hatch v. Fuller, 131 Mass. 574; Rogers v. Crain, 30 Tex. 284; Matteson v. N. Y. C. R. R. Co., 35 N. Y. 487; Gray v. McLaughlin, 26 Iowa 279; Kennard v. Burton, 25 Me. 39; The State v. Howard, 32 Vt. 380; Lush v. McDaniel, 13 Ired. 485.)

Also, if the declarations are made to a physician or other person merely for the purpose of obtaining testimony in the party's own case, they might be of very little value and possibly might in some cases be wholly excluded. (G. R. & I. Rld. Co. v. Huntley, 38 Mich. 537.) But the mere fact that the declarations are made after suit has been commenced and while it is pending will not be sufficient to exclude the declarations, and generally they should be allowed to go to the jury. (Barber v. Merriam, 93 Mass. 322; Hatch v. Fuller, 131 id. 574.)

In the present case we cannot say that the court below committed any material error in admitting the evidence objected to. Everything that the witnesses, Mrs. Thatcher and Mrs. Pitzer, testified to was proved by the competent testimony of other witnesses. The injury, the impaired health, the suffering, the pain and the entire condition of the plaintiff's body were fairly shown by the evidence that cannot be questioned, and very nearly all the declarations of the plaintiff, as testified to by Mrs. Thatcher and Mr. Pitzer were in substance declarations of present and existing pain, suffering and conditions of the body, and not narratives of past pain, or suffering, or conditions of the body; and to this extent they were unquestionably competent. Those declarations, if any, which were not concerning present and existing pain, suffering, and conditions of the body were so small in amount and so trifling and insignificant in their influence, and were concerning matters which were so thoroughly and incontestably proved by other competent evidence, that their admission by the court could not be material error.

Judgment of the court below will be affirmed.

All of the Justices concurring.

FREDA v. TISHBEIN.

174 Mich. 391. (1913)

STONE, J. This is an action of replevin brought by the plaintiff as special administratrix of the estate of August Tishbein, Sr., deceased, against the widow and son of said deceased. August Tishbein, Sr., died intestate on or about the 3rd day of October, 1910. No petition for administration was filed by his heirs, but after due time a petition was filed by the plaintiff as a creditor of said estate, and special administration was granted to her. It was claimed that the estate of said deceased consisted of a stock in trade at 357 Gratiot avenue, in the city of Detroit, and plaintiff, as special administratrix, brought an action of replevin to obtain possession of the stock from the widow and son, who were in possession when demand was made for the same. The record would indicate that the defendant August Tishbein, Jr., claimed to be the owner of the property when suit was commenced. The trial resulted in a verdict and judgment for the plaintiff, and the defendants have brought the case here for review.

The only errors upon which they rely relate to the action of the trial judge in admitting certain testimony of the plaintiff and her witnesses.

1. It is the claim of the defendants that certain testimony of the plaintiff was incompetent under section 10212 3 Comp. Laws, as amended, relating to matters equally within the knowledge of the deceased.

2. That the court erred in permitting the various witnesses of the plaintiff to testify as to statements made by decedent during his lifetime while in possession concerning the title to the stock of goods in question.

There is no evidence that any such statements were made in the presence of the defendants or either of them, and it is the claim of the defendants that such testimony was clearly hearsay, selfserving, and prejudicial.

1. Considering the matters in the order above stated, we will consider first whether the testimony of the plaintiff was within the terms of the statute prohibiting the opposite party, in a suit prosecuted or defended by personal representatives of the deceased person, from testifying to matters which, if true, must have been equally within the knowledge of the deceased. It should be borne in mind that the plaintiff represents the estate of the decedent. We do not think that

this statute renders the personal representative incompetent to testify in behalf of the estate as to matters within the decedent's knowledge.

2. The other question is one of more difficulty. Numerous witnesses, including the plaintiff, were permitted to testify to conversations with the decedent while he was in possession of the stock of goods, and not in the presence of either of the defendants, as to decedent's ownership of the stock. It is the claim of the plaintiff, and seems to have been the holding of the trial court, that such evidence was admissible as part of the *res gestae* and as verbal acts characterizing and explaining the nature of the possession. Under this ruling of the court certain testimony was admitted tending to show that the decedent said that he owned the stock. On the other hand, it is the claim of the defendants that the testimony was hearsay, self-serving and prejudicial, and thus inadmissible, and that the rule in this State is to the effect that declarations of the decedent cannot be shown if they are in favor of the party who made them, and adverse to the other party and many cases are cited by counsel on both sides.

It will be noted that in this case the evidence was offered and received as though there were some question qualifying or explanatory of the possession of the decedent. An examination of the evidence received shows that there was no question as to the nature of the possession, nor what was the title claimed by decedent. This evidence was offered to show who was the actual owner of this property. It was material upon this point, if material at all. It seems to us that such declarations were not admissible; that decedent was in possession of the stock of goods was the real question in issue. No question was raised as to the nature of his possession, and nothing was offered explanatory of, or qualifying, such possession, and we think the true rule is that where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party was the actual owner, such declarations are not admissible. The danger of admitting such testimony as tending to show who was the actual owner is apparent. It does not seem to us that mere possession may be termed an act, so as to justify the application of this branch of the doctrine of *res gestae*.

The instances, when the declarations should be received, are when the character of the possession, or nature of the claim made, becomes material with a view to the determination of some ulterior question; as, for instance, cases in which a right rests upon the statute of limitations, and it is necessary to show that the possession was adverse.

To say that, in a case where the only issue is actual ownership, a party may support his title by proof of his own declarations to third persons on sundry occasions, not in the presence of the claimant, is to declare that one may manufacture evidence for himself. Declarations by a party in possession against interest or in disparagement of title, are admissible under a different rule from that we are here considering. We think the evidence should not have been received, and that it was prejudicial error to allow it to be submitted to and considered by the jury.

For this error we are constrained to reverse the case and grant a new trial.

STEERE, C. J. and MOORE, BROOKE, KUHN, OSTRANDER and BIRD, JJ., concurred.

LESSOR of SCOTT et al. v. RATLIFFE et al.

5 Peters (U. S.) 80. (1831)

CHIEF JUSTICE MARSHALL. This is a writ of error to a judgment rendered in favor of the defendants, in an ejectment brought by the plaintiffs in the Court of the United States, for the seventh circuit, and district of Kentucky.

The plaintiffs claimed title as heirs of the Reverend James Madison, deceased, under a patent issued to him by the governor of Kentucky, on the 8th day of August, 1798. A verdict and judgment having been rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error. The case depends on several bills of exceptions taken to certain opinions given by the court at the trial of the cause.

The plaintiffs gave in evidence the patent to their ancestor. It grants to the Reverend James Madison a certain tract or parcel of land containing eighteen hundred and fifty acres, by survey, &c., and "bounded as follows." It then describes the exterior lines of the whole tract, after which the following words are used; "including within said bounds, five hundred and twenty-two acres of land entered for John Preston, four hundred and twenty-five acres for William Garrard; both claims have been excluded in the calculation of the plot with its appurtenances," &c.

They then gave evidence conducing to prove the death of the

grantee before the institution of the suit; that the plaintiffs Susannah and James C. were his heirs at law, and that the plaintiff Susannah had intermarried with the plaintiff Robert G. Scott. They then introduced Mrs. Eppes as a witness, who swore that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg she had seen Bishop Madison, and was acquainted with his daughter only by report; that she had never seen her or Mr. Scott, but recollects to have heard of her marriage in Petersburg, as she thought, before the death of her father; that she could not state from whom she heard the report, but she had three cousins who went to college at the time that she lived in Petersburg, and had no doubt that she heard them speak of the marriage; that she heard of the marriage of Miss Madison before her own marriage, as she thought, which was in 1810; that she was, as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead.

On the motion of the defendants, the court excluded this testimony as incompetent; and the counsel for the plaintiffs excepted to this opinion.

In considering this exception some diversity of opinion has prevailed in this court, with respect to that part of it which related to the time of the intermarriage between the plaintiff Robert G. Scott and Susan his wife. Some of the judges think that the evidence given by Mrs. Eppes respecting the time, as well as that respecting the fact of intermarriage, comes within the general rule excluding hearsay testimony, which was laid down by this court in the case of Mima Queen and child against Hepburn, 7 Cranch 290. That rule is, "that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge."

Others think that the fact of the marriage being established by other testimony, the circumstances that this fact was communicated to the witness before another event took place, becomes itself a fact, and is evidence that the marriage was anterior to that other event. It becomes unnecessary to decide on this principle, because we are all of opinion that so much of the testimony of Mrs. Eppes as goes to prove the death of Mr. Madison was admissible, and ought not to have been excluded.

The judgment is reversed, for error in the entire exclusion of the testimony of Mrs. Eppes; and the cause is to be remanded, with instruction to award a *venire facias de novo*.

ROGERS v. STATE.

88 Ark. 451. (1908)

HILL, Ch. J. Ben Rogers was indicted by the grand jury of Craighead county for robbery, was convicted, and has appealed. Fielder testified that on the night of May 31, 1908, in the city of Jonesboro, he left a restaurant, and was accompanied by one Tomlinson, and the defendant Rogers followed them. That Tomlinson offered him a drink of whisky, which he refused, and the defendant stepped up and said he would take a drink, and Tomlinson handed him the bottle, and he took a drink and dropped behind them, with the bottle. He and Tomlinson walked under the shadows of some trees, and some one hit him from behind with a bottle on the side of the head and face and he was knocked senseless. After he fell some one beat him on the head and face with his fists; and either Tomlinson or the defendant ran his hands in his pockets and got his money. "After I was hit, I do not remember anything until I was being talked to by Arrington, chief of police, in a plumbing shop on South Main street.

He was then permitted, over the objection of defendant, to state that "Mr. Arrington asked me who robbed me, and I told him a white man whose name I did not know and a negro whom they called Ben." The next morning he went to the jail to see if he could identify the defendant, who had been arrested. His eyes were so swollen that he could not see distinctly, and he asked that the defendant talk. The defendant did so, and he recognized him by his voice. The witness does not appear to have been cross-examined—at least the bill of exceptions does not show what part of his examination is in chief and what is cross-examination; and there is no inconsistent or contradictory statement in his testimony indicative that any part of it was brought out by cross-examination.

Arrington, the chief of police, was permitted to testify, over the objections of defendant, that he had arrested defendant the night that Fielder was robbed, and that he found Fielder in a plumbing shop on South Main street. "I asked Fielder who robbed him; he said a white man and a negro; that he did not know who the white man was, but they called the negro Ben Rogers." No money or other property was found on the defendant, after his arrest, that belonged to Fielder.

It appears that from one to two hours elapsed from the time that Fielder was robbed until he made the statement to the chief of

police in the plumbing shop. The defendant testified, denying that he had robbed Fielder, and stated that he was at another place at the time of the occurrence. Several other witnesses testified, tending to sustain his alibi.

The subject of prior consistent statements was recently considered by this court in Burks v. State, 78 Ark. 271, where one phase of it was discussed and the authorities reviewed. The court said: "After all, the effect of proof of previous consistent statements could only be to corroborate the statement of the witness under oath by his own words uttered on another occasion. It would add nothing to his statement upon the witness stand either as to his testimony on the main issue, or as to his denial of the contradiction. We are of the opinion that the admission of the testimony by the court was improper and prejudicial, and should not have been allowed."

This subject is exhaustively reviewed in 2 Wigmore on Evidence, sec. 1122 *et seq.* and the occasion and time when such statements may be admitted fully explained. In section 1124 Mr. Wigmore says: "When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless." In some classes of crime statements of a complaint being made are admissible, notably rape. 2 Wigmore, Evidence, 1134. Likewise, statements made by the owner or possessor of goods after an alleged robbery or larceny of them may, under some circumstances, be admitted. Upon principle, however, only the fact of the complaint, and not the details of the statement, will be admissible. 2 Wigmore, Evidence, sec. 1142.

Applying the principles here, it is plain to be seen that the prior consistent statements were inadmissible; and, as their tendency was naturally to reinforce the testimony of the witness prior to an attack upon it, by incompetent testimony, it would ordinarily be prejudicial. It is necessarily so in this case, as the conviction depends solely upon the testimony of Fielder, as against the testimony tending to prove that the defendant was at another place, and could not and did not commit the robbery.

The Attorney General seeks to sustain the admission of these statements as a part of the *res gestae*. Mr. Wharton's definition and explanation of *res gestae*, quoted in Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, has often been approved by this court. He says: "Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or

emanations of, such act, and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about it." In this case the evidence is what the person said when talking about the act, and was not the voluntary emanation of the act itself. See further applications of the principle in Williams v. State, 66 Ark. 264; Blair v. State, 69 Ark. 558; Kansas City S. Ry. Co. v. Morris, 80 Ark. 528; Beal & Doyle Dry Goods Co. v. Carr, 85 Ark. 479.

For the error indicated the judgment is reversed and the cause remanded for new trial.

PARKHURST v. KRELLINGER.

69 Vt. 375. (1897)

START, J. This action is brought to recover for boarding and nursing Nellie Krellinger, an unmarried daughter of the defendant. It appeared that Nellie had been ill for some weeks before going to the plaintiff's house, during which time she had been at the home of her father; that, for some time previous to her illness, but for how long a time did not appear, Nellie had been away at work, and, while so away, was taken sick and returned to her father's house; that, during her illness, she had no means for her support and was unable to support herself by work; and that her father was possessed of sufficient means to provide for her.

The defendant claimed that his daughter was over eighteen years of age, and, upon this issue, was allowed to show that she had a birthday party, on which occasion there was a birthday cake with figures thereon indicating her age. The party was before the controversy arose and at a time when the defendant could have no motive in representing the age of his daughter to be different from what it was in fact; and we think the evidence must be regarded as in the nature of an act of the defendant that rendered his claim more probable, and was admissible.

Judgment reversed on another ground.

NORTHERN PACIFIC R. R. CO. v. URLIN.

158 U. S. 271. (1894)

This was an action brought by Alfred J. Urlin, in the Circuit Court of the United States for the District of Montana, against the Northern Pacific Railroad Company, to recover for personal injuries received by him when traveling as a passenger in one of its trains.

The car in which the plaintiff was riding became derailed, and was thrown down a bank and overturned. The complaint charged that the accident was due to "the defective, decayed and rotten condition of the cross-ties" in the road, and that the plaintiff received "severe and dangerous wounds and internal injuries."

The case proceeded to trial before the court and a jury, and resulted in a verdict for the plaintiff in the sum of $7500, and the jury also returned certain special findings which had been submitted to them at the request of the defendant. Judgment was entered upon said verdict and special findings. During the trial several exceptions were taken by the defendant, which were allowed and signed by the judge, and which are brought for review to this court by a writ of error.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

The third assignment of error is strenuously pressed on our attention in the brief of the plaintiff in error. It arises out of the refusal of the court below to suppress certain portions of the depositions of Drs. Mills and DeWitt because of incompetency and as merely hearsay.

This objection is founded upon the witnesses having been permitted to testify to statements made by the defendant, at various times, to the physicians in respect to his feelings, aches, and pains, and it is contended that such statements were made too long after the occurrence of the injury to be part of the *res gestae,* but were merely narrations of past incidents; and it is further urged that, whatever reason there may have formerly been when a party could not himself testify to his sensations, for liberality in admitting such statements, now that he is a competent witness, such reason no longer operates.

An inspection of the depositions shows that the statements objected to were mainly utterances and exclamations of the defendant when undergoing physical examinations by the medical witnesses. As one of the principal questions in the case was whether the injuries of the defendant were of a permanent or of a temporary character, it was

certainly competent to prove that, during the two years which had elapsed between the happening of the accident and the trial, there were several medical examinations into the condition of the plaintiff. Every one knows that when injuries are internal and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination.

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant they are of greater weight as evidence, but if made to any other person they are not, on that account, rejected." 1 Greenl. Ev. 14th ed. sec. 102.

In Fleming v. Springfield, 154 Mass. 520, 522, where such a question arose, it was said:

"The testimony of Dr. Rice was properly admitted. The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narrative of something that was past; and it may be fairly inferred that it was made for the purpose of medical advice and treatment. At any rate, although it was only a day or two before, or possibly during the trial, it does not appear that such is not the case."

The declarations of a party himself, to whomsoever made are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant they are of more weight than if made to another person.

Affirmed.

SOTO v. TERRITORY.

12 Ariz. 36. (1908)

SLOAN, J. The appellant, Soto, was charged and convicted in the court below with having committed the infamous crime against nature with one Amilio Sherman, a Mexican boy of about the age of four years. Upon the trial the mother of the boy testified that about 11 o'clock on the morning of the 2nd of March, 1907, she sent her son to a store, situated about the distance of six blocks from her home, to purchase some red chili and candy; and that at about half-past 12 o'clock her son returned crying and very pale; that she examined him and found him lacerated and bleeding. She was then asked by the district attorney to state what, if anything, was said by the boy then as to the cause of his injuries. The question was objected to by counsel for the defendant, but the objection was overruled, and the witness was then permitted to state in full what was said by the boy as to what had transpired between himself and the defendant. Other witnesses testified to having seen the boy soon after his return to his mother's house, and that he was then in a state of excitement and was crying and complaining of his injuries. These witnesses described the injuries as did the mother. The admission of the testimony of the latter as to the statement of her son as to the details of the alleged assault is complained of by counsel for appellant and is the only question raised on this appeal.

Upon no branch of the law of evidence is there such confusion and seeming conflict as in the application of the rule admitting statements as a part of the *res gestae*. As expressed by Chief Justice Blakely of Georgia: "The difficulty of formulating a description of the *res gestae* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family."

In its application to statements made by injured persons after their injuries as to the circumstances of such injuries Mr. Wigmore, in his work on Evidence has well pointed out that "the verbal act" or *res gestae* rule is inadequate to account for their admission. Their admission is rather based upon the theory that human experience shows that under circumstances of physical shock or great nervous excitement a person will give utterance to the truth as to their knowledge of the event which produced such shock or nervous excitement.

and their experience in relation thereto. As the learned author points out, the verbal act rule is distinct from this, which may be denominated the rule of "spontaneous utterance," in that the former is based upon the theory that the utterance is part of the entire act and is admitted without reference to its trustworthiness, while the latter like that of a dying declaration, rests entirely upon the assumed truthfulness of the utterance. Logic requires that the former shall be strictly contemporaneous with the main event, or follow it so closely as to constitute both one entire transaction. Greater flexibility as to time is permitted in the application of the latter rule, but to render such statements or declarations admissible the circumstances must be such as naturally to produce such shock or nervous excitement as to render the utterance spontaneous and unreflective; and it must have been uttered while such shock or nervous excitement may be supposed still to dominate and control and keep in abeyance the reflective powers of the person who has made it. It follows that such utterance or statement under this rule need not be shown to be contemporaneous with the event which called it forth, provided there has not been time for the exciting cause to lose its effect. As to the limit of time within which the exciting cause should be held to have been so dissipated as to render such statement inadmissible, no rule may be formulated. Each case must depend upon its own facts and must be left to the sound discretion of the trial court.

We do not mean to imply that the time when such utterance is made with reference to the main event should not be an important or even a controlling factor in the exercise of the court's discretion in the admission of such testimony. Where the victim of an assault is of an age to render it improbable that his utterance was deliberate and its effect premeditated in any degree, we do not think it is required that such utterance to be admissible as evidence shall have been so nearly contemporaneous with the event which gave rise to it as in the case of an older person, whose reflective powers are not presumed to be so easily affected or kept in abeyance. Testimony of declarations or statements made by a person under the rule of spontaneous utterance is admitted in evidence, notwithstanding he be not called as a witness and testify at the trial, and his testimony is admissible, notwithstanding he be incompetent as a witness because of youth. In a case similar to this the court of criminal appeals of Texas held that the statements of a child, made after an alleged assault had been committed upon her were admissible in evidence, notwithstanding the fact that she was incompetent to testify because of

her age. Croomes v. State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882; Kenney v. State (4 Tex. Cr. App.), 79 S. W. 818, 65 L. R. A. 316; State v. Andrews, 130 Iowa 609, 105 N. W. 215.

Applying the doctrine to the case at bar, we cannot say that the trial court erred in admitting the testimony of the mother of the boy as to his statements of what had taken place between him and the defendant. When we consider his youth, his physical condition, the degree of excitement and nervousness he was under at the time of his return to his home, and when his statements were made, and all the surrounding circumstances shown in evidence, we think it was within the sound discretion of the trial court to have permitted this testimony to go to the jury.

The judgment is affirmed.

KENT, C. J. and CAMPBELL and NAVE, JJ., concur.

PEOPLE v. GAGE.

62 Mich. 271. (1886)

CHAMPLIN, J. The respondent was convicted of an assault with intent to commit rape upon a female child of the age of ten years or more.

The evidence showed that the little girl was ten years and four months old at the time the offense was committed.

It appeared from the testimony of the girl that the respondent, at the time he committed the alleged offense, told the girl that she must not tell her father about it; that if she did he would give her an awful whipping and that she did not tell her parents of it for fear her father would whip her. It appears, also, that a few days after the transaction she told of it to a cousin, and that her parents only found it out in August, a short time before respondent was arrested, and thereupon her mother questioned her in regard to it; and this conversation was received in evidence, against the respondent's objection, in which the mother was permitted to detail all the circumstances of the transaction constituting the alleged offense.

Prof Greenleaf says:

"Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular

facts which she stated are not admissible in evidence except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached.

"On the direct examination the practice has been merely to ask her whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple 'yes' or 'no'. Indeed, the complaint constitutes no part of the *res gestae*,—it is only a fact corroborative of the testimony of the complainant; and where she is not a witness in the case, it is wholly inadmissible." 3 Greenl. Ev. sec. 213.

The rule stated above is supported by abundant authority: 1 Phil. Ev. 233; Baccio v. People, 41 N. Y. 265; 1 Russ. Cr. 689; Roscoe, Crim. Ev. 26, note 1; Rex v. Clarke, 2 Starkie, 241; Reg. v. Walker, 2 Moody & R. 212; Reg. v. Meyson, 9 Car. & P. 418; People v. McGee, 1 Denio 19; Phillips v. State, 9 Humph. 246; Pefferling v. State, 44 Tex. 486; People v. Hulse, 3 Hill 316.

But we think the rule not an inflexible one, and ought to yield where the particular circumstances of the case make it inapplicable; as where the party outraged is of tender years and her silence is the direct consequence of fears of chastisement induced by threats of the perpetrator of the wrong. The reason of the rule admitting the fact that complaint was made, and excluding the complaint itself, is founded, aside from its being hearsay, by those courts which do not treat it as part of the *res gestae*, upon the danger of allowing a designing female to corroborate her testimony by statements made by herself to third persons, and the difficulty of disproving the principal fact by the accused. But some courts hold that the evidence that complaint was made is not received merely as corroborative of the statement of the prosecutrix, but as part of *res gestae*, where they are made immediately after the outrage complained of, and this is the holding of our own court: Lambert v. People, 29 Mich. 71: People v. Brown, 53 id. 531.

If the complaint made immediately after the occurrence constitutes part of the *res gestae*, it would seem that not only the fact that complaint was made, but the complaint made, should be admitted. Besides, the reason upon which the rule of exclusion is based, namely, the difficulty of disproving the accusation, no longer exists in this State, where the accused is permitted to testify in his own behalf. We think in this case there was no error in admitting the testimony of the mother of the child.

The judgment is affirmed.
The other Justices concurred.

HARRIMAN et al. v. STOWE.

57 Mo. 93. (1874)

WAGNER, J. The plaintiff, a married woman, in conjunction with her husband brought this action for damages against the defendant for injuries sustained by her in falling through a hatchway which, it was alleged, was constructed by defendant, and by him negligently, carelessly and wrongfully left insecure and unprotected.

The answer denied the allegations of negligence, and as a further defense set up that the house where the hatchway was built was the property of defendant's wife, and that defendant in doing the work was acting as her agent. There was a replication as to negligence and carelessness, but it was admitted that the property belonged to defendant's wife.

The verdict and judgment were for plaintiff, and defendant appealed. On the trial E. W. Shauffler was sworn as a witness for the plaintiff and stated that he was a practicing physician, and as such attended on the plaintiff. The defendant objected to his giving any testimony because under the statute he was incompetent. This objection was overruled.

The witness was then asked to state in what condition he found the plaintiff when he was called in. This question was objected to by the defendant for the same reason as above given. The court sustained the objection, but permitted the witness to answer under the following restriction: "In answering the question you will not reveal any information you may have received from the plaintiff while attending her in your professional character, which information was necessary to enable you to prescribe for her as a patient in your capacity as physician or surgeon." The witness then gave testimony tending to show that plaintiff was injured about noon, what her injuries were, that he was her physician before that time and that he was called to see her between one and four o'clock of that day. At the same time she stated to him that the trap-door in the kitchen had been left in an insecure condition, and that she stepped on it and fell through.

The general rule is, that evidence in order to become a part of the *res gestae* should consist of declarations made contemporaneously, or nearly so, with the main event by which it is alleged that the principal transaction occurred. Browness v. Pacific R. R. Co., 47 Mo. 239.

But in Ins. Co. v. Mosely (8 Wall. 397) where the question was carefully and ably considered, it was declared that though generally the declarations must be contemporaneous with the event, yet where there are any connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestae*.

In the present case the witness came within a short time after the plaintiff received the injuries. He found her suffering, and she told him how she was hurt, namely, by falling through the trap door.

The accident and the declarations formed connecting circumstances, and in the ordinary affairs of life no one would doubt the truth of these declarations or hesitate to credit them as evidence. I can perceive no valid objection to their admissibility.

Judgment affirmed.

COMMONWEALTH v. M'PIKE.

57 Mass. 181. (1849)

The defendant was indicted in the Municipal Court of the city of Boston and there tried before Hopkins, J., at the last November term, for the offense of manslaughter. The indictment alleged, that the defendant, on the 4th of July, 1848, and in the night time of that day, feloniously assaulted Elizabeth M'Pike the wife of the defendant, and stabbed her near the right hip joint, with a dangerous weapon, to wit, a knife, inflicting therewith a mortal wound, of which the party injured died on the 7th of October, 1848.

At the trial, the attorney for the commonwealth introduced evidence, that the deceased, between twelve and one o'clock on the morning of the 5th of July ran from her room, where her husband the defendant was to the room occupied by the witness in the same house, in the story above that of the defendant, and there knocked at the door, crying murder. On being let in, the deceased wanted the occupant to call a doctor and a priest, saying that she was killed. The witness saw that the deceased was wounded, and that blood was run-

ning down upon the floor, and started immediately for a physician. On opening her door to go out, she met the defendant at the door, and pushed him aside and went out.

The attorney for the Commonwealth called Benjamin D. Shaw as a witness, who testified, that, about the time mentioned by the preceding witness, he heard the voice of a woman crying murder, as she was going up stairs. He got up and going towards the room, met the last witness coming out, who told him not to go up, for the defendant would kill her, and he then saw the defendant coming out of the room. The witness then went for a watchman, and, coming back went immediately up to the room where the deceased was, and there found her lying on the floor bleeding profusely. She asked the witness for some water, and to go for a physician. She said that John (meaning the defendant) had stabbed her and told the witness what she wanted done, if she died. The defendant objected to the admission of the declaration of the wife, that the defendant had stabbed her; but the court admitted the testimony.

DEWEY, J. The admission in evidence of the statement of the party injured, as to the cause and manner of the injury which terminated in her death may be sustained upon the ground, that the testimony was of the nature of the *res gestae*. The witness describes the situation in which he found the party, her appearance and her request for assistance, and, in connection therewith her declaration of the cause of the injury. The period of time, at which these acts and statements took place, was so recent after the receiving of the injury, as to justify the admission of the evidence as a part of the *res gestae*. In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge.

Exceptions overruled.

STATE v. LASECI.

90 Ohio St. 10. (1914)

On the evening of January 1, 1913, Mike Zacharias, in company with his little son, aged about four years, and certain other men, visited the saloon of his brother, William Zacharias, in Berea street, Berea.

Across the street from William Zacharias' saloon, another saloon was kept by a man by the name of Frank Niec. Between ten and eleven o'clock in the evening, the defendant, John Lasecki, accompanied by John Wisniewski and Ignatz Maslinski, left Niec's place. Just before they left, Niec passed two clubs over the bar to them. Some few minutes later they returned to Niec's place, without clubs, and went into a side room. At about this time Mike Zacharias was killed in the street not far distant from Niec's place.

Testimony was also offered to show that several others left Zacharias' saloon with the deceased at about this time, including the deceased's little son. The party left the saloon for the purpose of taking a car to Cleveland. As they walked towards the car Mike and his son were the last of the party. An altercation was heard between Mike and some other men not of his party. The sound of two or three blows, as if by a club, was heard by the men ahead of him. One or more of these men ran back and found the deceased lying on the ground and also saw some men running away. As they came up to where Mike was lying, the boy, in a nervous and much frightened state of mind, said, "The bums killed pa with a broomstick." The boy was then about twenty-five feet away from his father and out of hearing of those who were fleeing from the scene of the attack.

The above statement of facts is taken *verbatim* from the opinion of the Court of Appeals, and it is on this exclamation of the boy that the Court of Appeals reversed the judgment of conviction obtained in the Common Pleas Court, and which judgment of reversal the State asks to have reversed in this court.

WANAMAKER, J. Was the exclamation of the boy competent testimony?

Both sides agree that this is the only question in the case, and that the testimony is competent only upon the theory that it is a part of the *res gestae* of the case.

The record discloses that the exclamation arose in the following manner:

"Q. You may tell if anything unusual happened there and what it was, anything out of the ordinary? A. We was walking about one hundred and fifty feet from the car, maybe two hundred, I couldn't tell you, and I heard the hitting twice, like that (indicating), and think there was an argument started and the boy said that the bums had killed his papa with a broomstick. Objection. Objection overruled. Exception."

It will be noted that there was no objection to the question, and that the objection is to the whole answer.

Now, manifestly, the major part of the answer is competent and responsive to the question. If the exclamation of the boy be incompetent, the objection of counsel should have been addressed to that exclamation, asking an order from the court to exclude it from the consideration of the jury. But that was not done. Where objection is made to the entire answer, part of which is competent and part incompetent, there is but one thing for the trial judge to do, that is to overrule the objection, and in this case there was no error on the part of the trial court

But we are not disposed to decide a case of this importance upon the mere failure of counsel to properly save his rights, and shall consider the case on its merits, as if the objection and exception had been properly made.

Was the exclamation a part of the *res gestae?*

Wharton's definition of *res gestae* is as follows: "Those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense; that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate casual relation to the act—a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gestae; remembering that immediateness is tested by closeness, not of time but by causal relation, as just explained.*" 7 Words and Phrases Judicially Defined, 6130.

Again, Wharton says *res gestae* are the facts which form the environment of a litigated issue.

It is impossible to reconcile the multitude of divers decisions by courts of last resort on the proper scope and limitations of the old phrase *res gestae.* Many of the states follow reverently and rigidly the old English rule, that before any exclamation is admissible in evidence on the theory of *res gestae,* it must be contemporaneous in time with the principal fact in litigation. That is, just as soon as it appears that it is subsequent in time to the principal fact and merely

narrative of it, such exclamation is not a part of the *res gestae* and is, therefore, not admissible.

This old English rule had its birth in a strange combination of circumstances. First, the inhumanity and barbarity of the penalties provided by the English law for criminal cases. A century ago two hundred crimes in England were punishable by death. Second, the prisoner had no rights in an English court of justice, save the right to be convicted. He was not competent as a witness in his own behalf, nor indeed were any members of his family. He was not allowed the privilege of having his own counsel address the jury, and indeed, in earlier days, was not even allowed the privilege of counsel. He had no right of appeal, and many other prerogatives now enjoyed by the defendants were wholly unknown to the English law a century or more ago.

With these barbarous penalties and this outrageously unjust procedure it is little wonder that the humanity of the judge as well as his love of legal casuistry should resort to a strained and technical construction of the law to overcome its barbarity.

The second class of states practically ignored the old English doctrine of contemporaneous character of facts or exclamations and considered chiefly the causal connection or logical relation that the secondary facts sustain to the primary facts in controversy.

Now, applying the doctrine or test of causation, it would be expected not infrequently that there would be an appreciable interval between cause and effect, between those things that have a logical relation, such as the commission of an act and an impulsive exclamation concerning the same.

Now, when the exclamation is the combined result of the tragic circumstances of the situation making an awful and fearful impression upon the human mind, especially that of a child seeing its own father murderously assaulted, the child being overwhelmed with fear and grief because of the darkness of the night, the absence of a helping hand, grief of parental loss, with nobody to appeal to, all these combined placing the child under natural and extreme excitement, and, then, after a few seconds, some one comes into his presence to help, what is more natural, indeed necessary, in such situation than just such an exclamation as we have in this case, "The bums killed pa with a broomstick"?

The language proceeds from impulse, from the natural and necessary impressions made by the acts of the parties in controversy, so that the human mind in its helplessness or despair, or its natural and

necessary anxiety, acts under an impulse or a spontaneous influence that is a sort of echo or reaction from the general situation. The time limit recognized by those courts that fall under this second class which disregards the strict contemporary character, is placed at a point where there is no opportunity given for fabrication or manufacturing some statement or story according to one's self-interest.

We feel, however, that it is but just to say that the judgment of the Court of Appeals in this case finds abundant warrant in the former decisions of this court in analogous cases.

We believe, however, that the demands of justice, as well as the probative force and effect of such exclamations made where there is a maximum probability as to their truth and a minimum possibility of artifice or fabrication by reason of their being natural, spontaneous and, sometimes, as in this case, the necessary language of a child, require that the old rule should be relaxed and liberalized so as to meet the naturalness and necessities of the case, as well as to put the jury and court in possession of all the facts, circumstances and environment immediately before and after the principal fact in controversy.

The judgment of the Court of Appeals is reversed and the judgment of the Court of Common Pleas is affirmed, and the cause remanded to the Court of Common Pleas for further proceedings according to law.

Judgment reversed.

NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

GRANT v. STATE.

124 Ga. 757. (1905)

BECK, J. The plaintiff in error was charged with the offense of murder, and was convicted of that offense, without a recommendation. He moved for a new trial, his motion embracing several grounds.

Exception was taken to the refusal of the court to exclude the following testimony: "Mary's [deceased's] child said, 'Huss [defendant], you have shot mama.'" The testimony quoted was that of Jake Colbert, a witness for the State, and it was objected to "on the ground that the solicitor-general, in opening the case to the jury,

had stated that Mary Johnson's (deceased's) child the one referred to by the witness Colbert, was too young to be a competent witness or to testify." And movant adds that this (foregoing statement of the solicitor-general) "was true, and allowing Colbert to testify as to what the child said was in effect allowing the child to testify." We cannot agree with counsel that permitting the witness to testify to the words of a little child, too young to be brought into court as a witness, was equivalent to permitting the child itself to testify. It appears from the evidence that the witness Colbert, at the sound of the shots which slew the deceased, ran immediately from an adjoining room into the one where the homicide was committed, and said twice to the defendant, "Have you shot Mary?" The defendant made no answer, but the child, as the defendant silently left the room, uttered the words, "Huss, you have shot mama." These words, spoken by a little child immediately after the shocking occurrence, were clearly admissible as a part of the *res gestae*. No declaration could have been freer "from all suspicion of device or afterthought," and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself speaking through the mouth of a babe.

Judgment affirmed. All the Justices concur, except Atkinson, J., who did not preside.

JORDAN v. STATE.

81 Ala. 20. (1886)

This case comes up on appeal to this court the second time. The appellants, Jule and Handy Jordan, two colored men, were under indictment for the murder of one Albert York, also a colored man. The homicide occurred at night in the house of one Jerry Williams, in the county of Montgomery. The house consisted of two rooms with a partition wall between, in which was a door connecting the two rooms, and, on the night of the difficulty, a party was being given at this house, and for the occasion, one of the rooms was designated as the "party room" and the other as the "dancing room". The evidence on the part of the State, among other things, tended to show, that, on the night of the difficulty, defendant, Jule Jordan, being

at the party, attempted to light a cigar, and, in doing so, put out both lights in the "party room," leaving the room dark, and, thereupon, one Sam Williams caught hold of one Mason Taylor, and jokingly said that he (Taylor) was the only one present who would steal anything; that Taylor became angry and Jerry Williams and the deceased, Albert York, took Taylor out of the room; that one Raoul, whose wife was giving the party, came outside and began to quarrel with Taylor about taking people from the party; and defendant, Jule Jordan, came up and drawing a pistol, said, "I will put a light hole through any one who strikes Mason Taylor." Whereupon Raoul, having a knife in his hand, said, "Do you mean me?" and Jule Jordan, pointing his pistol, at Raoul, replied, "D—n you, I'll shoot you if you move." Then Jerry Williams and the deceased quieted this difficulty, and, as they were returning to the house, deceased took Jule Jordan's pistol from him and gave it to one Warren Beasley and subsequently, at request of deceased, said Beasley returned the pistol to Jule Jordan. Shortly afterwards, Jule Jordan came into the party room with a stick in his hand and Jerry Williams and deceased took the stick from him, and while so doing, defendant, Handy Jordan came up and said, 'Turn Jule loose, or I will cut you up." Thereupon, Jerry Williams told Handy they were not hurting Jule, and no more was then said. *All this occurred about a half hour before the killing.*

The defendants separately moved the exclusion of all the testimony in reference to the difficulty with Mason Taylor; which motions the court refused, and the defendants separately excepted. The defendants then moved the exclusion of all the testimony preceding the remark of Jule Jordan, about "putting a light hole," &c.; which motion was overruled and they separately excepted.

Defendants next moved the exclusion of all the testimony after the said remark of Jule Jordan; which the court refused, and defendants separately excepted.

They then moved the exclusion of that portion of the testimony in reference to taking the stick from Jule Jordan and what Handy said about cutting up some one; the court, overruled the motion, and defendants separately excepted.

CLOPTON, J. In respect to the relevancy of evidence, the general rule is, that it must be confined to the points in issue, and no circumstance is admissible, which does not tend to establish a fact material to the prosecution or defense, or from which no presumption or inference can be reasonably drawn in reference to a material fact or

inquiry involved in the issue. It is often difficult to determine when a fact or circumstance is too remote to aid the jury in arriving at a conclusion on the issues to be tried. It may be said generally, that all parts of one continuous transaction, though not shown to have any immediate connection with the offense—the culmination of all the circumstances—and facts, proximate to the consummation of the crime, which tend to shed light on the main inquiry, are admissible. The occurrences in which the deceased, Jule Jordan and Mason Taylor, were involved at the place of the homicide and during the same evening, may be regarded as constituting a continuous transaction, though brief intervals of time may have intervened; and the declaration of Jordan, that he would put a light hole through any one who struck Mason Taylor, tends to illustrate his motive and purpose in addressing deceased, when he afterwards struck Taylor. Armour v. The State, 63 Ala. 173; Mattison v. The State, 55 Ala. 224. The evidence being admissible against one of the defendants, could not be excluded on the objection of the other, though inadmissible against him. He should relieve himself from its influence by a charge limiting its operation.

Reversed and remanded on other grounds.

LANDER v. THE PEOPLE.

104 Ill. 248. (1882)

MULKEY, J. At the December term, 1881, of the Macon County Circuit Court, George Lander, plaintiff in error, was tried and convicted of the crime of rape upon the person of Mary Sturgis and was duly sentenced to the penitentiary for a period of twenty-five years, in pursuance of the verdict of the jury, and the accused brings the case here for review, and asks for a reversal on several grounds, but chiefly because the evidence does not, as is alleged, sustain the conviction.

The real and vital question in the case, is as is conceded by counsel for plaintiff in error, does the evidence sustain the conviction.

Hattie Moore testifies: "I was with Minnie Blentz and saw Mrs. Sturgis lying at the side of the railroad track. It was between four and five o'clock in the afternoon, and about two miles from the depot. I saw a man on his knees over her, and as he got up he made

a motion with his hands as if pulling down her clothes. I was twenty-five yards away from them. We hallooed, then he got up, clumb the fence, and ran into the woods. Mrs. Sturgis sat there about five minutes, when she was helped home by Charley Athons. She seemed in great pain and distress, and complained of being internally injured. The next day Minnie Blentz called me to the window of her house and pointed to a man going west on the railroad, and said, 'There goes the man.' I said, 'Yes, there he goes.' The man we saw was this defendant."

Minnie Blentz, spoken of by the last witness as being in company with her at the time of the assault, testifies substantially to the same facts sworn to by Hattie Moore. Charley Gouker and Warren Marthland were also examined on behalf of the People, both of whom testify they were near the place testified to by the prosecutrix, and saw the assault made upon her; and while they did not get a fair view of the assailant's face, yet, from his general appearance, they give it as their opinion the accused is the same person. They further testify that when requested by the State's Attorney to pick him out from a number of other persons seated on the opposite side of the bar, they were able to do so.

Thus we see four persons, besides the prosecutrix, unimpeached and unimpeachable, so far as the record shows, who were eye witnesses of the assault, swearing to the best of their opinion, the accused is the perpetrator of the offense, and this is denied by no one other than the accused himself. Under these circumstances we are of opinion the jury were fully warranted in reaching the conclusion they did.

As already appears from the testimony of Minnie Blentz and Hattie Moore, the accused, on the day following the assault, was passing near the place where it happened, when the former, calling the attention of the latter to the accused, exclaimed, "There goes the man," the other replying, "Yes, there he goes," and the court, against the objection of the defendant, permitted the witnesses, in giving an account of the transaction, to repeat these exclamations, made at the time by the witnesses, and this is assigned for error. We do not think the point well taken. It is a well settled principle in the law of evidence, that whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper to also show any accompanying act, declaration or exclamation which relates to, or is explanatory of such fact or event. Such acts, declarations or exclamations are known to the law as *res*

gestae. It is not questioned that it was perfectly competent to show that the witnesses saw and readily recognized the accused, near the scene of the transaction, on the following day, as testified to by them, and it must be admitted the spontaneous exclamation, "There goes the man," with the response, "Yes, there he goes," is highly characteristic of the fact of their recognition. The true test, in all cases, by which the admissibility of such testimony is determined, is, the act, declaration or exclamation must be so intimately interwoven or connected with the principal fact or event which it characterizes, as to be regarded as a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony, and we are of opinion the circumstances of this case clearly bring it within the rule.

Perceiving no substantial error in the record, the judgment will be *Affirmed.*

MITCHELL v. COLGLAZIER.

106 Ind. 464. (1886)

MITCHELL, J. The complaint in this case charges that David Colglazier, with the intent to defraud the plaintiff, a judgment creditor, and without consideration, conveyed certain real estate, of which he was the owner, to his wife. The suit was to set aside this conveyance.

Louisa Colglazier, answered separately, and the ruling of the court, in overruling a demurrer to her answer, presents the principal question for decision.

The substance of her answer was, that in 1872, she was the wife of David Colglazier, and was possessed of certain moneys and choses in action which were her separate property, and that she appointed her husband to purchase for her the property in controversy. It is averred that, while so acting for her, he did purchase the land for $2,100, and that he made the entire cash payment of $100 with her money, and gave his own notes for the deferred payments. He also, took the title to himself without her knowledge or consent. As the notes for the deferred payments came due, she supposing the title of the land was in her name, furnished the money with which they were all paid off. Upon discovering that the title was in her husband,

she demanded that the property should be conveyed to her. In pursuance of her demand and before the plaintiff's judgment was recovered, the conveyance, the making of which is the subject of the suit, was made.

The objections which are made to this answer are, that it does not controvert the charge of fraud, nor deny that the deed was made without consideration. This view does not seem to be sustained. Conceding that there is no direct denial of the imputed fraud, and that it is not stated in terms, that a valuable consideration was paid for the conveyance, the conclusion nevertheless follows irresistibly, that the deed was neither fraudulent nor without consideration.

The motion for a new trial assigns among other grounds that the court erred in admitting certain evidence over the appellant's objection. The testimony thus admitted was to the effect that, on the day Mrs. Colglazier learned that her husband had taken the title to the land in dispute in his own name, she declared that her money paid for it and that she wanted it conveyed to her, and demanded that it should be done. The conveyance was made upon the same day, in pursuance of her demand.

This testimony was competent as tending to show the consideration upon which the deed was made, and that it was made in pursuance of the demand of Mrs. Colglazier. It was part of the *res gestae*, and so connected with the execution of the deed as to make it competent as part of the transaction. Doe v. Reagan, 5 Blackf. 217; Kenney v. Phillips, 91 Ind. 511.

The judgment is affirmed, with costs.

THROCKMORTON v. HOLT.

180 U. S. 552. (1900)

This was a proceeding in the Supreme Court of the District of Columbia for the purpose of proving an alleged will of the late Joseph Holt, a distinguished lawyer and for many years Judge Advocate General of the United States Army, who died at the age of eight-seven, in Washington on Aug. 1, 1894, after a residence of many years in that city. The proceeding resulted in the rejection of the paper on the ground that it was not the will of Judge Holt but was a forged document, and judgment refusing probate was entered upon

the verdict of the jury. The proponents of the will appealed to the Court of Appeals of the District, but before the appeal was brought on for argument Miss Hynes, one of the legatees named in the will, withdrew her appeal. The judgment of the Supreme Court upon the appeal of the other proponents was subsequently affirmed by the Court of Appeals, and the proponents of the paper, excepting Miss Hynes, have brought the case here by writ of error.

MR. JUSTICE PECKHAM. The facts set forth in the statement prefixed to this opinion show the case to be one of an extraordinary nature. There being no proof in regard to the history or whereabouts of the paper before it was received by the register of wills, and the evidence pro and con as to its genuineness having been received upon the trial, the question arises as to the admissibility of the various declarations of the deceased, and also of his letters to different relatives living in Kentucky and other states, which it is claimed tend to show the improbability of the deceased making such a disposition of his property as is made in the paper in controversy. The question is, in other words, can the contestants prove by unsworn oral declarations and by letters of the deceased facts from which an inference is sought to be drawn that the disposition of the property as made in the paper is improbable, and that the paper was therefore a forgery? The decisions of the state courts as to the admissibility of this kind of evidence are not in accord. Those included in class A favor the exclusion of such evidence, while those in class B favor its admission. The principle of exclusion was favored by Chancellor Kent, and also by Justices Washington, Story, Livingston and Thompson, all of whom once occupied seats upon the bench of this court.

The cases cited in the two classes do not all, or even a majority of them, deal with the question of forgery, but many of them treat the subject of declarations of a deceased person upon a principle which would admit or exclude them in a case where a forgery was the issue.

In the cases contained in class A, it is held that declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become a part of the *res gestae* are not admissible as evidence in favor of or against the validity of the will. The exception to the rule as admitted by these is that where the issue involves the testamentary capacity of the testator and also when questions of undue influence over a weakened mind are the subject of inquiry, declarations of the testator made before or after, and yet so near to the

time of the execution of the will as to permit of the inference that the same state of mind existed when the will was made are admissible for the purpose of supporting or disproving the mental capacity of the testator to make a will at the time of the execution of the instrument propounded as such. These declarations are to be admitted, not in any manner as proof of the truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or, in other words, the mental capacity of the testator at the time when the instrument in question was executed.

The cases contained in class B favor generally the admission of declarations of the deceased, made under similar conditions in which declarations are excluded by the cases in class A.

If declarations of the character now under consideration are admissible when made prior to the execution of the alleged will, although not after it, then a large part of the evidence in this case as to the oral and written declarations of the deceased was properly admitted upon the issue of forgery, because such declarations may have all been made before the forgery was executed, the date of the paper not furnishing any evidence of the time when it was in fact prepared. The forger could not be permitted, by giving a date to the instrument, to fix the time subsequent to which the declarations should be excluded.

But we see no good ground for the distinction. The reasons for excluding them after the date of the will are just as potent when they were made prior thereto. When made prior to the will, it is said they indicate an intention as to a testamentary disposition of property thereafter to be made, and that such declarations may be corroborative of the other testimony as to what is contained in the will, as is said by Mellish, L. J. in Sugden v. Lord St. Leonards, L. R. 1 P. D. 154, 251, (a case of a lost will) or else they indicate the feeling of the deceased toward his relatives, from which an inference is sought that a testamentary provision not in accordance with such declarations would be forged. The declarations are, however, unsworn in either case, and if they are inadmissible on that ground when made subsequent to the execution of the will, they would be also inadmissible, when made prior to its execution. In Stevens v. Vancleve, 4 Washington, D. C. 262, 265, *supra*, Mr. Justice Washington said that declarations of the deceased, prior or subsequent to the execution of the will, were nothing more than hearsay, and there was nothing more dangerous than their admission, either to control the

construction of the instrument or to support or destroy its validity. Judge Pennington concurred in those views.

After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestae* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not a part of the *res gestae,* declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity) but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not

the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and the subject of the declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statements and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations.

We are therefore of opinion that the court below erred in admitting this evidence upon the issue of forgery, and that the error was of a most important and material nature.

The judgment of the Court of Appeals of the District of Columbia is reversed and the cause remanded to that court with directions to reverse the judgment of the Supreme Court of the District and to remand the cause to that court with instructions to grant a new trial.

SPRINGFIELD CONSOLIDATED RAILWAY CO. v. PUNTENNEY.

200 Ill. 9. (1902)

CARTER, J. The appellee, Eleanor Puntenney, recovered a judgment in the Sangamon Circuit Court against the appellants, the Springfield Consolidated Railway Company and the Springfield Transfer Company, for damages for personal injuries which she received in a collision between a street car of said railway company and a cab of the transfer company in which she was being conveyed as a passenger. The Appellate Court affirmed the judgment, and the defendants have brought the record to this court for review on errors of law.

It is also claimed that the court erred in not allowing Louis Dellert, a witness called by the railway company, to testify to a conversation he had with the driver of the cab just after the accident, in which it is claimed the driver said that it was all his fault. The event had fully transpired, and what was said was purely narrative of a past transaction fully ended, and did not characterize or in any way relate

to a transaction then taking place. While the statements of the driver of the cab sought to be proved were claimed to have been made almost immediately after the accident, it did not appear but that they were made under circumstances that would deprive them of their spontaneous character as utterances called forth by the transaction itself. We are of the opinion that it was not made to appear that the statements called for were a part of the *res gestae,* and the court did not err in excluding them. See Monroe v. Snow, 121 Ill 126; 21 Am. & Eng. Encyc. of Law, 99, 102.

Judgment affirmed.

HUTCHEIS v. CEDAR RAPIDS & MARION CITY R. R. CO.

128 Iowa 279. (1905)

Action to recover damages for personal injuries alleged to have resulted from falling or being thrown to the pavement in attempting to alight from a street car operated by the defendant company. Verdict and judgment for plaintiff for $2,000. Defendant appeals. Affirmed.

McCLAIN, J. Plaintiff's witnesses were allowed, over defendant's objection to testify that after plaintiff fell, she exclaimed, "Yes, let the step down after I fall!" this declaration being relevant to similar evidence tending to show that the step was let down after plaintiff fell, and not, as it should have been at the time when the bar was raised after the car left the bridge, and before it stopped at the street crossing. The objection to the admission of proof of this declaration is that it could not be shown as a part of the *res gestae.* Under recent decisions of this sort, proof of the declaration was admissible. It was made immediately after the accident, with reference to the cause of the fall, without opportunity for premeditation. Without elaboration, it is sufficient to refer to Rothrock v. Cedar Rapids, 103 N. W. 475; Alsever v. Minneapolis & St. L. R. Co., 115 Iowa 338; Keyes v. Cedar Falls, 107 Iowa 510.

Finding no error in the record, the judgment of the lower court is

Affirmed.

GREINKE v. THE CHICAGO CITY RAILWAY CO.

234 Ill. 564. (1908)

HAND, J. This was an action on the case commenced in the Superior Court of Cook County by the appellee, a minor, by her next friend, to recover damages alleged to have been sustained by her on August 6, 1904, in consequence of the negligence of the appellant while she was a passenger upon one of its street cars, in the city of Chicago.

The general issue was filed and a trial resulted in a verdict in favor of the appellee for the sum of $5,000, upon which the trial court, after overruling motions for a new trial and in arrest of judgment, rendered judgment, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

It is further contended that the court erred in admitting in evidence certain expert testimony offered upon the trial upon behalf of the appellee. It was claimed that the appellee was suffering with paralysis as a result of the injury which she received, and she called as a witness on her behalf one Dr. Stephen W. Cox, who had examined the appellee on the day before he testified, to qualify himself as an expert witness, and who was permitted to testify over the objection of the appellant, that at the time of his examination of the appellee she was nervous; that there was a twitching and jerking of her hands; that there was a slight drooping of the left leg or left foot as she allowed it to hang over a chair; that the toes of the left foot turned in more than those of her right foot; that the step with the left foot was not as strong as that with the right,—"not exactly a dragging but a suspicion of dragging;" that he tested the strength of her hands by taking hold of them with his hands and asking her to squeeze; that he noticed a difference in the strength of her hands; that one thumb was weaker than the other; that the examination was not made for the purpose of treating the appellee but that he might testify as a witness in her case; that he could not say positively whether the jerking and twitching which he observed were voluntary or involuntary; that his impression was that they were involuntary; that the muscles which produced the conditions observed by him were voluntary and under the control of the appellee.

The rule is well established in this State that the declarations of the injured party, in a case like this, when made as a part of the

res gestae or to a physician during treatment or upon an examination prior to and without reference to the bringing of an action to recover damages for the injury complained of, may be introduced in evidence; (Illinois Central Railroad Co. v. Sutton, 43 Ill. 438; West Chicago Street Railroad Co. v. Carr, 170 id. 478; Springfield Consolidated Railway Co. v. Hoeffner, 175 id. 634; Lake Street Elevated Railroad Co. v. Shaw, 203 id. 39; Chicago City Railway Co. v. Bundy, 210 id. 39;) but the declarations of the injured party made to a physician who has made an examination of such party with a view to qualify himself to testify as a witness only, are not admissible. (Chicago and Eastern Illinois Railroad Co. v. Donworth, 203 Ill. 192; Chicago City Railway Co. v. Shreve, 226 id. 530; City of Chicago v. McNally, 227 id. 14; Chicago Union Traction Co. v. Giese, *supra;* Eckels v. Mutschall, 230 Ill. 462; Kath v. Wisconsin Central Railway Co., 121 Wis. 503; 99 N. W. 217; Grand Rapids and Indiana Railroad Co. v. Huntley, 38 Mich. 537. It has also been held that witnesses who are not experts may express their opinions as to the physical condition of persons whom they have observed;—that is, they may state whether, in their opinion, such persons are in good health, have the ability to perform work, whether they are suffering pain, are conscious or unconscious, in possession of their mental faculties, etc. (West Chicago Street Railway Co. v. Fishman, 169 Ill. 196; Cicero and Proviso Street Railway Co. v. Priest, 190 id. 592; Chicago and Eastern Illinois Railroad Co. v. Randolph, 199 id. 126.) The rule however, is well settled that a physician, when called as a witness who has not treated the injured party but has examined him solely as a basis upon which to found an opinion to be given in a trial to recover damages for the injury sustained by the injured party, cannot testify to the statements made by the injured party to him, or in his presence, during such examination, or base an opinion upon the statements of the injured party. (Illinois Central Railroad Co. v. Sutton, *supra;* West Chicago Street Railroad Co. v. Carr, *supra;* West Chicago Street Railroad Co. v. Kennelly, 170 Ill. 508; Stevens v. People, 215 id. 593.) An expert witness called under such circumstances must base his opinion upon objective, and not subjective, conditions. If, therefore, it would have been improper for Dr. Cox to have inquired of the appellee as to the relative strength of her hands, or as to whether she could use her left leg as well as her right leg, or whether she could walk without dragging her left leg, and it would have been incompetent for him to have given to the jury the result of such interrogations by detailing to them her replies to said questions (as clearly

it would have been), we think it equally clear that he could not reach the same result by having her answer his questions by a nod of the head or by the pressure of her hands, or by asking her to sit upon a a chair, or to walk, and then giving the jury the results of his observations.

The declarations of an injured party as to his physical condition, brought about as a result of injury, are self-serving, and, at the best, hearsay evidence. Statements, however, made by an injured party which form a part of the *res gestae,* or those made to his physician during treatment, constitute an exception to the general rule, and are admitted by reason of the fact that he will not be presumed to prevaricate at the very instant of his injury or while he is stating his physical condition to a physician from whom he expects and hopes to receive medical aid, nor will he be presumed to feign disease, pain or distress under those conditions in which he is ordinarily observed by strangers or his friends and neighbors. No such safe guards however surround him when he is being examined by an expert whom he has employed to examine him and to give evidence in his case which is about to be tried in court. To permit the injured party, while undergoing an examination by an expert in his employ, by jerks and twitches, by a pressure of his hand, by turning his toes in or by dragging one of his legs when walking, to thus make evidence for himself, bolster up and strengthen by his opinion the self-serving testimony thus manufactured by the injured party, would open up the door wide for the grossest fraud, which might work upon his adversary the most palpable injury. This character of self-serving testimony has been held incompetent by the Supreme Court of Michigan in McCormick v. City of West Bay City, 110 Mich. 265, and Comstock v. Georgetown Township, 137 id. 541, 100 N. W. 788, and the general rule announced by that court is, we think, in entire harmony with the ruling of this court in the numerous cases hereinbefore cited, and is the correct rule and the one most conducive to justice.

We do not intend to hold, however, that a physician may not be able, from an examination of an injured party, to form and express an opinion as to his physical condition and the probable cause which induced such condition, based upon objective testimony alone, but what we do intend to hold is, that a physician who has not treated the injured party but who has made an examination of the injured party solely with a view to testify as an expert, should not be permitted to express an expert opinion to the jury based upon subjective conditions, and then be allowed to fortify his opinion by stating to the jury acts

of the injured party which could have been purely voluntary and under the control of the injured party, and which may rest upon no other basis than the truthfulness of the injured party.

Judgment affirmed.

WATERMAN v. WHITNEY.

11 N. Y. 157. (1854)

In July, 1846, the surrogate of Broome county made an order refusing to admit to probate, the will of Joshua Whitney, late of Binghamton, in said county, who died in April, 1845. The respondents, Waterman and others, appealed from the order of the surrogate to the circuit judge of the sixth circuit, who in 1847 reversed the order, and directed feigned issues to be made and tried at the next Circuit Court, to be held in the county of Broome.

Issues were afterwards settled as follows: 1. Was the instrument propounded by Thomas G. Waterman and others, before J. R. Dickinson, Esq. late surrogate of the county of Broome, bearing date on the 26th day of February, 1844, and purporting to be the last will and testament of Joshua Whitney, deceased, late of the town of Chenango, county of Broome, duly made and executed by the said Joshua Whitney as his last will and testament? 2. Was the said Joshua Whitney, deceased, at the time of making and executing the said paper writing bearing date of the 26th day of February, 1844, purporting to be his last will and testament, of sound mind, and capable of making a valid disposition of his property, real and personal, by last will and testament? 3. Was there, on the day of executing the said paper writing, purporting to be the last will and testament of said Joshua Whitney, deceased, or at any time previous, any undue influence, fraud or deception used or practiced by any person or persons whatever, to cause or induce the said Joshua, deceased, to make or execute the said instrument, propounded by the said Thomas G. Waterman and others for proof, as the last will and testament of the said Joshua Whitney, deceased?

SELDEN, J. The principal question presented by the bill of exceptions in this case is, as to the admissibility of the declarations of the testator made after the execution of the will.

The subject to which this question belongs is of very considerable

interest, and one upon which the decisions are to some extent in conflict. Much of the difficulty, however, has arisen from the omission to distinguish with sufficient clearness, between the different objects for which the declarations of testators may be offered in evidence, in cases involving the validity of their wills. It will tend to elucidate the subject to consider it, under the following classification of the purposes for which the evidence may be offered, viz. 1. To show a revocation of a will admitted to have been once valid. 2. To impeach the validity of a will for duress, or on account of some fraud or imposition practiced upon the testator, or for some other cause not involving his mental condition. 3. To show the mental incapacity of the testator, or that the will was procured by undue influence. The rules by which the admissibility of the evidence is governed, naturally arrange themselves in accordance with this classification. They have, however, been considered in most of the cases without regard to it; and hence much of the apparent conflict among them will disappear, when the proper distinctions are taken.

To show the state of the authorities, therefore, and what the differences really are between them, it is necessary to arrange the cases according to this arrangement of the objects for which the evidence is given. In referring however, to those belonging to the first of these divisions, it is proper to premise, that the revocation of a valid will, is a matter which not only in England, but in this state, and in most if not all the other states, is regulated by statute: and these statutes are substantially the same; those in this country being for the most part taken from the English statute of frauds. Most if not all these statutes require either a written revocation executed with the same formalities as the will itself, or some act amounting to a virtual destruction of the will, such as burning, tearing, obliterating, &c., accompanied by an unequivocal intention to revoke it. Mere words will in no case amount to a revocation.

Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given, upon a question of revocation, is to establish the *animo revocandi;* in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are in the main in harmony with each other, and in general entirely accord with the view here presented.

I consider these cases as establishing the doctrine that upon a question of revocation, no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such

declarations being received as a part of the *res gestae,* and for the purpose of showing the intent of the act.

In regard to the second class of cases, viz. where the validity of a will is disputed on the ground of fraud, duress, mistake or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will and are strictly a part of the *res gestae.*

I have referred thus particularly to these numerous cases in which the declarations of testators have been held inadmissible upon contests respecting the validity of their wills, for the purpose of showing that they all apply to one or the other of the first two of the three classes into which I have divided the cases on the subject. None of them have any application to cases in which the will is assailed on account of the insanity, or mental incapacity of the testator at the time the will was executed, or on the ground that the will was obtained by undue influence.

The difference is certainly very obvious between receiving the declaration of a testator, to prove a distinct external fact, such as duress or fraud for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter it is the most direct and appropriate species of evidence. Questions of mental competency and of undue influence belong in this respect to the same class; because, as is said by Jarman in his work on wills, "The amount of undue influence which will be sufficient to invalidate a will, must of course vary with the strength or weakness of the mind of the testator." (Jarman on Wills, 36.) So the mental strength and condition of the testator is directly in issue in every case of alleged undue influence; and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged. It is abundantly settled that upon either of these questions, the declarations of the testator, made *at or before* the time of the execution of the will, are competent evidence. The only doubt which exists on the subject is, whether declarations made *subsequent* thereto may be also received.

There is no conflict between the doctrine here advanced in regard to the admissibility of the species of evidence in question, and the rule before adverted to, which excludes it when the issue is as to the revocation of a will. The difference between the two cases consists in the different nature of the inquiries involved. One relates to a vol-

untary and conscious act of the mind; and the other to its involuntary state or condition. To receive evidence of subsequent declarations in the former case, would be attended with all the dangers which could grow out of changes of purpose or of external motive operation upon an intelligent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator.

The judgment of the Supreme Court must be reversed, and there must be a new trial of the issues.

DENI, JOHNSON, PARKER, ALLEN and EDWARDS, JJ., concurred.

CLARK v. TURNER.

50 Neb. 290. (1897)

IRVINE, C.

John J. Turner was an elderly citizen of the city of Lincoln. blessed with a pious disposition and a considerable quantity of this world's goods. He died March 1, 1890, leaving him surviving two sons, William J. Turner and R. Morris Turner. Some time after his death William M. Clark and Nahum S. Scott propounded for probate what purported to be a copy of John J. Turner's last will and testament, it being alleged that said will had been deposited in a valise belonging to the testator, which, after his death, had been delivered to his sons, and that thereafter it was claimed that the house in which the valise had been kept was burglariously entered, the valise cut open, and its contents extracted. The probate was contested by the two sons. The result of the proceedings on the county court does not appear from the record. The case was, however, appealed to the district court. where, as a result of what appears to have been a third trial there, a verdict was rendered in favor of the contestants.

The difficulty lies in the proof which was offered as to the contents of the will. It does not appear that any person ever read the will, or was aware of any portion of its contents except through statements made by Dr. Turner. The strongest evidence is that of Captain Scott, to the effect that Dr. Turner came to his office declaring that he had made his will, and then read it to Captain Scott, asking him whether it was in legal form. Captain Scott was blind and therefore did not see the will himself, so that his testimony amounts to nothing more than a repetition of Dr. Turner's declarations as to its contents. In addition

to this there is evidence of a few declarations made to others subsequently as to the effect of different provisions contained in the will. Dr. Turner told Mr. Clark that he and Captain Scott were named as executors. He told Karen Rootham that he had provided for her; he told his pastor, Dr. Curtis, something in regard to the bequests to the two missionary boards; beyond this there is no evidence as to the contents of the will.

The precise question does not seem to have often arisen. We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will and in proof of issues relating to the testator's competency or to undue influence, but it has been doubted whether such declarations may be received to establish a revocation. It follows that in all proceedings to probate a lost will, such declarations are admissible in evidence because the existence of the will must necessarily be established by some such indirect method. The declarations having been admitted for that purpose their sufficiency to establish the contents of the will is another question.

In England, prior to the leading case of Sugden v. Lord St. Leonards, L. R., 1 P. D. 154, it was considered that the declarations were not admissible as tending to prove the contents. Doe v. Palmer, 16 Q. B. (Eng.), 747, turned upon the question whether an interlineation had been made before or after the execution of the will, and it was held that the testator's declarations as to his intentions made before the execution of the will were admissible, but the declarations made after its execution were not. Quick v. Quick, 3 Swab. & T. (Eng.), 442, was a case startlingly like that at bar in some points. The sole evidence of the contents of the will was the testator's declaration. There was the same fact of the will being kept in a bag and of its being taken by burglars. The court held that there was a failure of proof, holding also that the declarations were incompetent. The Court of Appeals, however, in Sugden v. Lord St. Leonards, overruled Quick v. Quick and distinctly held such declarations admissible. The will in question was, however, proved by much other evidence; Miss Sugden, the testator's daughter, had not only heard the will read but she had herself read it a number of times and was able to testify in much detail as to its contents from such personal inspection; moreover, not less than eight codicils were found, the terms of these all tending to corroborate her as to the contents of the original will. In addition to this proof there was the evidence of the testator's declarations as to the will's contents. The long and exhaustive opinions are directed only incidentally to the admissibility of the declarations. The crucial question having been whether all

the evidence was sufficient to establish the will, the case, therefore, falls far short of holding that the contents of a lost will may be proved solely by the declarations of the testator. Its effect is merely that such declarations are admissible to corroborate more direct evidence. This is the construction given the case by the house of lords in Woodward v. Goulstone, 11 App. Cas. (Eng.), 469, where the declarations of the testator were held insufficient alone to establish the will. An intimation was given that Sugden v. Lord St. Leonards was not considered free from doubt and the question there presented left open. The importance of interests involved in probate cases in Egland is such that the decisions of English courts on such subjects are entitled to great weight, and we may safely say that the result of the English cases is that the contents of a lost will cannot be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration.

The American cases relied on to support proponents' theory are, when examined, in strict accordance with the English rule. In re Page, 118 Ill. 576, expressly follows Sugden v. Lord St. Leonards, and comes within the true doctrine of that case, because the declarations in that case merely went to corroborate the testimony of the lawyer who drew the will and who produced a copy thereof.

On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear and convincing. As said by the Supreme Court of the United States in Leav. Polk County Copper Co., 21 How. 493: "Courts of justice lend a very unwilling ear to statements of what dead men have said." Such evidence is always considered dangerous, and subject to the closest scrutiny. We think it would be in the highest degree dangerous, and would be violative of the object and spirit of the statute, should we hold that the existence and contents of an alleged will might be established solely by testimony of the testator's declarations. As already indicated, this view leads to affirmation of the judgment, because the verdict was the only one warranted by the evidence.

Judgment affirmed.

Note. The term "*res gestæ*," as used in the law of evidence, has a vague meaning. Interpretations of the term by the courts are not at all harmonious. As said by Chief Justice Beasley, "I think I may safely say that there are few problems in the law of evidence more unsolved than what things are embraced in those occurrences that are designated in the law as the *res gestæ*" (Hunter v. State, 40 N. J. L. 536).

OPINION EVIDENCE.[1]

HARDY v. MERRILL.

56 N. H. 227. (1875)

Appeal by William H. Hardy against Isaac D. Merrill, from the decree of the judge of probate approving and allowing, in solemn form, the will of Joseph Hardy, deceased. Said will was dated July 26, 1870. Issues had been made up at the law term, and sent to the Circuit Court for trial by jury. The issues were in common form. In the first, the executor alleged that the said Joseph Hardy was of sound mind; and in the second, he alleged that said will was not obtained by undue influence: upon both of which allegations issue was taken by the appellant.

FOSTER, C. J., C. C. The case before us involves an inquiry into the nature and extent of the exceptions to the general rule, that testimony of facts alone is admissible in courts of justice, and that the opinions of witnesses are to be excluded.

Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity—Commonwealth v. Sturtevant, 117 Mass.; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice.

The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses to form an accurate judgment in regard to it. DeWitt v. Barley, 17 N. Y. 340; Bellows, J., in Taylor v. Grand Trunk Railway, 48 N. H. 309.

How can a witness describe the weight of a horse, or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, —because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances,— because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of descriptions,—the opinion of the observer is admissible from the necessity of the case;

[1] Hughes on Evidence, p. 155.

and witnesses are permitted to say of a person, "He seemed to be frightened;" "he was greatly excited;" "he was much confused;" he was "agitated;" "he was pleased;" "he was angry." All these emotions are expressed to the observer by appearance of the countenance, the eye, the general manner and bearing of the individual—appearances which are plainly enough recognized by a person of good judgment but which he can not otherwise communicate than by an expression of results in the shape of an opinion. See Best on the Principles of Evidence 585. It is on this principle, says Mr. Best, that testimony to character is received: as where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath. Best on Ev. 657. "So," continues Mr. Best, "the state of an unproducible portion of real evidence,—as, for instance, the appearance of a building or of a public document which the law will not allow to be brought from its repository,—may be explained by a term expressing a complex idea, e. g., that it looked old, decayed, or fresh; was in good or bad condition, &c. So, also, may the emotions or feelings of a party whose psychological condition is a question. Thus, a witness may state as to whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened, or the like."

A non-expert may testify that he thought a horse "was not then sound: his feet appeared to have a disease of long standing"—Willis v. Quimby, 31 N. H. 485, 487; that a horse "appeared to be well, and free from disease;" that he thought "he never saw any indication of the horse being diseased"—Spear v. Richardson, 34 N. H. 428-431. These two cases relate to the physical condition of a horse. The same doctrine is equally well settled in relation to the mental and moral condition of a horse, so to speak; for, in State v. Avery, 44 N. H. 393. 392, it was held—Bellows, J.—that a non-expert might testify, on an indictment for cruelly beating a horse, that the horse drove like a pleasant and well-disposed horse, unless when harassed by the whip; that, at the time of the beating, he saw no viciousness or obstinacy in the horse, and that the blows appeared to affect the horse in a particular manner. The evidence was opinion, and nothing else; and it was opinion of the mental and moral condition of the horse, judged of by the witness from actions which it was impossible for the witness to describe in any better or more satisfactory way, so as to give the jury the best evidence the nature of the subject permitted.

In Whittier v. Franklin, .6 N. H. 23, an action for a defective highway,—one point of the defense being that the plaintiff's horse, which he

was driving at the time of the accident, was vicious and unsafe, and that the plaintiff's injuries were caused by the vices of his horse,—it was held—Judge Bellows delivering the opinion of the court—that a non-expert who witnessed the accident might testify that he did not see any appearance of fright; that the horse did not appear to be frightened in the least before he went off the bank, or afterwards; that he appeared to be rather a sulky dispositioned horse to use." Judge Bellows cites People v. Eastwood, 14 N. Y. 562, where it was held that opinions as to whether a person is intoxicated may be received. Milton v. Rowland, 11 Ala. 732—opinions as to the existence of disease, when perceptible to the senses; Bennett v. Fail, 26 Ala. 605—opinion that a slave appeared to be healthy; and other cases in relation to opinions of a healthy or sickly condition of body. He also cites Spear v. Richardson and Wills v. Quimby, before referred to, as to opinion of health of horses. The very learned judge says that the substance of the statement of the witness is, that the horse did not appear to be frightened, but appeared to be sulky, that, on such subjects, persons of common observation may and do form opinions, that are reasonably reliable in courts of justice, from marks and peculiarities that could not in words be conveyed to the minds of jurors, to enable them to make the just inferences; that it is much like the testimony that a horse appeared well and free from disease, or that a person appeared to be healthy, or intoxicated—p. 26. The evidence was held admissible as an opinion.

What reason is there for allowing a witness to testify that a horse appeared to have a sulky disposition, and not allowing the same witness to testify that a man appeared to have a similar disposition? What difference whether the witness says, "He appeared to have a sulky disposition"? or, "In my opinion, based upon my own observation of him, he had a sulky disposition."

A non-expert may give his opinion on the physical health of a man as well as on the physical health of a horse—State v. Knapp, 45 N. H. 148-150; may give his opinion not only that a horse did not appear to be frightened, but also that a lady did not seem to be frightened or excited—Taylor v. Railway, 48 N. H. 304, 306, 309.

The opinion of non-experts in relation to mental condition is not limited to the question of a mental disturbance caused by fright. In Bradley v. Salmon Falls Manufacturing Co., 30 N. H. 487, 491, it was held that a non-expert might testify that the plaintiff "seemed satisfied with a business arrangement proposed to him by the witness."

In McKee v. Nelson, 4 Cow. 355, it was held that, in an action for a breach of promise of marriage, a witness who knew the plaintiff and

had observed her conduct and deportment towards the defendant, was permitted to express his opinion that the plaintiff was sincerely attached to the defendant,—"a fact" said Judge Selden, "which it is plain could be proved in no other way;" and this decision was cited as undoubted law by Judge Parker, in Robertson v. Stark, 15 N. H. 114, 115. In McKee v. Nelson, the court say,—"There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify"—precisely what Judge Bellow, in Whittier v. Franklin, said of the frightened mental condition and sulky disposition of a horse.

Better illustrations, I think, could not be had of the meaning of the rule admitting the best evidence.

A boy works many years on a farm; and the question arises, What was the value of his services? Suppose he is dead, as is the subject of inquiry in this and every testamentary case; one of the material questions would be whether the boy was bright or stupid, amiable or morose. What evidence on these points would be so satisfactory as the opinions of the intelligent and disinterested farmers in the neighborhood, who knew him well? If there was a general concurrence in their opinions, one way or the other, would it not be decisive? and, if there was not a concurrence, would not the cross-examination as to the grounds and reasons of their opinions generally show the facts much better than any statement of facts without opinions?

What facts without opinion can any parent state as to his own children, to give a stranger any such tangible and satisfactory information of their mental and moral peculiarities as is given by an expression of his opinion?

It would be superfluous for me to add that I fully concur in the views and opinions expressed by Judge Doe in Boardman v. Woodman and State v. Pike, and that I cordially endorse the remarks of Judge Redfield (11 Am. Law Reg., N. E. page 259), as follows: "The learned judge shows very conclusively, both upon authorities and reason, that the opinion of the unprofessional witnesses, in such a case, is commonly far more reliable as a basis of ultimate decision in questions of sanity and mental capacity, than any specific facts which could possibly be gathered from the witnesses. We have said in our book on wills, and in other places, all that we could desire to say, both as to the rationale of the rule, and the support which it receives from authority. The tendency of the American courts in the last few years has been largely in the direction contended for by the learned judge; and there seems to be little question that it must ultimately prevail all

but universally. We should rejoice at such a result, as greatly tending towards the establishment of truth with greater facility and certainty in a very important class of cases." See Redf. on Wills (4th ed., A. D. 1876) 138-145, where many other cases than those hereinbefore alluded to are cited and commented upon.

Thus supported upon principle and authority, I am satisfied that the time has arrived when this court is called upon to declare the law to be in conformity with the views I have expressed.

LADD, J. I think it is shown by proofs which fall little, if at all, short of demonstration, that the doctrine excluding the opinions of non-experts on the question of insanity has grown up in this state within the memory of men now living in the profession; that it had no place in the common law brought here from England, nor in the jurisprudence or practice in this state, from the constitution down to a comparatively recent date; that it is contrary to reason, extremely difficult of application, and inconvenient in practice; that the great weight of judicial opinion and authority outside this state is against it; and that, even if we look at the condition of authority as shown by the expression of judicial opinion and practice in this state, the balance cannot fairly be said to be in favor of the rule. No titles are to be disturbed by adopting a rule more consonant with reason, and which accords with the almost universal practice in jurisdictions where the common law is used the world over. I therefore concur fully with my brother Foster in the conclusions at which he has arrived.

CUSHING, C. J., concurred.

Case discharged.

CONNECTICUT MUTUAL LIFE INS. CO. v. LATHROP.

111 U. S. 612. (1883)

This was a writ of error from a judgment in favor of Helen Pitkin, the beneficiary in two policies issued by the Connecticut Mutual Life Insurance Company upon the life of her husband—one, on the 10th day of August, 1866, for the sum of $5,000; and the other, on the 24th day of September, 1873, for the sum of $423. The insured, George E. Pitkin, died on the 29th day of September, 1878. After the case came to this court the beneficiary in the policies died, and there was a revivor against her personal representative.

The defense was the same as to each policy. Briefly stated, it was this: That the policy expressly provides that in case the insured shall, after its execution, become so far intemperate as to impair his health, or induce delirium tremens, or should die by his own hand, it shall be void and of no effect; that, after its execution and delivery, he did become so far intemperate as to impair his health, and induce delirium tremens; also, that he died by his own hand, because with premeditation and deliberation, he shot himself through the head with a bullet discharged by himself from a pistol, by reason whereof he died. Further, that the affirmative answer by plaintiff, in her application for insurance, to the question, whether the insured was then and had always been of temperate habits, being false and untrue, the contract was annulled; because, by its terms, the policy was to become void if the statements and representations in the application—constituting the basis of the contract between the parties—were not in all respects true and correct.

The plaintiff, in her reply, put in issue all the material allegations of the answer, except that alleging the self-destruction of her husband; as to which she averred that, "at the time he committed said act of self-destruction, and with reference thereto," he "was not in possession of his mental faculties and was not responsible for said act."

MR. JUSTICE HARLAN. At the close of the evidence introduced for the plaintiff, the defendant, by counsel, moved the court to instruct the jury that upon the pleadings and evidence the plaintiff could not recover. That motion was denied, and the action of the court—to which the defendant at the time excepted—is assigned for error.

This brings us to the consideration of the substantial questions presented by the assignments of error. They relate to the admission, against the objections of the defendant, of certain evidence touching the condition of the mind of the insured at or about the time he destroyed his life.

It is contended, in behalf of plaintiff in error, that the impressions and opinions of these non-professional witnesses as to the mental condition of the insured, although accompanied by a statement of the grounds upon which they rested, were incompetent as evidence of the fact of insanity. This question was substantially presented in Ins. Co. v. Rodel, *ubi supra,* which was an action upon a life policy containing a clause of forfeiture in case the insured died by his own hand. The issue was as to his sanity at the time of the act of self-destruction. Witnesses acquainted with him described his conduct and appearance at or about, and shortly before, his death. They testified that he "looked like he

was insane;" another, that his impression was that the insured "was not in his right mind." In that case the court said that, "although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony, and expressed in an artificial way the impressions which are usually made by insane persons upon people of ordinary understanding."

The general rule undoubtedly is, that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well-established exception in the case of witnesses having special knowledge or skill in the business, art, or science, the principles of which are involved in the issue to be tried. Thus, the opinions of medical men are admissible in evidence as to the sanity or insanity of a person at a particular time, because they are supposed to have become by study and experience, familiar with the symptoms of mental disease and, therefore qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon facts within their personal knowledge, as upon a hypothetical case disclosed by the testimony of others. But are there no other exceptions to the general rule to which we have referred?

While the mere opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because, the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached. It will also depend, in part, upon the degree of the mental unsoundness of the person whose condition is the subject of inquiry; for, his derangement may be so total and palpable that but slight observation is necessary to enable persons of ordinary understanding to form a reasonably accurate judgment as to his sanity or insanity; in other cases, the symptoms may be of such

an occult character as to require the closest scrutiny and the highest skill to detect the existence of insanity.

The truth is, the statement of a non-professional witness as to the sanity or insanity, at a particular time, of an individual, whose appearance, manner and motions of another person, or which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. But, in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact; not, indeed, a fact established by direct and positive proof, because in most, if not all cases, it is impossible to determine, with absolute certainty, the precise mental condition of another; yet, being founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge upon such subjects. Insanity is a "disease of the mind which assumes as many and various forms as there are shades of difference in the human character." It is, as has been well said, "a condition, which impresses itself as an aggregate on the observer," and the opinion of one, personally cognizant of the minute circumstances making up that aggregate, and which are detailed in connection with such opinion, is, in its essence, only a fact "at short-hand." 1 Wharton & Stille's Med. Juris., sec. 257. This species of evidence should be admitted, not only because of its intrinsic value, when the result of observation by persons of intelligence, but from necessity. We say from necessity, because a jury or court, having had no opportunity for personal observation, would otherwise be deprived of the knowledge which others possess; but, also because, if the witness may be permitted to state—as undoubtedly, he would be, where his opportunities of observation have been adequate—"that he has known the individual for many years; has repeatedly conversed with him and heard others converse with him; that the witness had noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that, in his conduct he was wild, irrational, extravagant, and crazy,—what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment, and what the *indicia* of sound or disordered intellect?

Affirmed.

COMMONWEALTH v. STURTIVANT.

117 Mass. 122. (1874)

Indictment for the murder of Simeon Sturtivant, at Halifax, in the county of Plymouth, on February 15, 1874. Trial before Wells and Ames, JJ., who allowed a bill of exceptions in substance as follows:

1. There was evidence tending to show that Simeon Sturtivant and Mary Buckley, his housekeeper, were last seen alive about half past six o'clock on Sunday evening, February 15, 1874, and that Thomas Sturtivant was last seen alive about half past four o'clock of the afternoon of the same day; that about half past seven o'clock on the morning of the 16th, Mary Buckley was found lying dead in a field about thirty-five rods from the dwelling-house of the Sturtivants, and soon afterwards the dead body of Thomas was found lying in one room of the house, and that of Simeon in another room; that between these rooms was another large room, all the doors of which were closed.

The only evidence tending to show who was the murderer of either of these persons was circumstantial. The government contended that the evidence tended to show that the three persons were killed by the same person, with the same weapon, at the same time.

ENDICOTT, J. There was evidence tending to show that three persons, Simeon Sturtivant, Thomas Sturtivant and Mary Buckley, were killed at the same time, by the same weapon.

The principal exception is to the competency of the evidence in regard to the blood-stain. The question here is whether a witness, who is familiar with blood and has examined, with a lens, a blood-stain upon a coat, when it was fresh, can also testify that the appearance then indicated the direction from which it came, and that it came from below upward, although he has never experimented with blood or other fluid in this respect. The witness had previously testified to its appearance at the time he examined it, and to the fact that at the trial it was not in the same condition, some of the blood having been rubbed off.

The exception to the general rule that witnesses cannot give opinions, is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the

same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject matter which requires no special learning or experiment, but which is within the knowledge of men in general.

Every person is competent to express an opinion on a question of identity as applied to persons, things, animals or handwriting, and may give his judgment in regard to the size, color, weight of objects, and may estimate time and distances. He may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to come. State v. Shinborn, 46 N. H. 497. The correspondence between boots and foot-prints is a matter requiring no peculiar knowledge, and to which any person can testify. Commonwealth v. Pope, 103 Mass. 440. So a person not an expert may give his opinion whether certain hairs are human hairs. Commonwealth v. Dorsey, 103 Mass. 412. And a witness may state what he understood by certain "expressions, gestures and intonations," and to whom they were applied; otherwise the jury could not fully understand their meaning. Leonard v. Allen, 11 Cush. 241.

In this connection may be noticed a large class of cases, where, from certain appearances more or less difficult to describe in words, witnesses have been permitted to state their conclusions in relation to indications of disease or health, and the condition or qualities of animals or persons. As when a witness testifies that a horse's foot appeared to be diseased, he states a matter of fact open to the observation of common men. Willis v. Quimby, 31 N. H. 485. And it is proper for a witness to give his opinion that a horse appeared to be sulky and not frightened at the time of an accident; Whittier v. Franklin, 46 N. H. 23; or he may testify as to the qualities and appearance of a horse. State v. Avery, 44 N. H. 392. In Currier v. Boston & Maine Railroad, 34 N. H. 498, it is said that the question whether there was hard pan in an excavation does not ask for an opinion, but seeks for facts within the knowledge of the witness, and of which the knowledge may be obtained by common observation. It is competent for a witness to testify to the condition of health of a person, and that he is ill or disabled, or has a fever, or is destitute and in need of relief; Parker v. Boston & Hingham Steamboat Co., 109 Mass. 449; Wilkinson v. Mosely, 30 Ala. 562; Barker v. Coleman, 35 Ala. 221; Autauga County v. Davis, 32 Ala. 703; and one may testify that another acted as if she felt very sad. Culver v. Dwight, 6 Gray, 444. So those who have

observed the relations and conduct of two persons to each other may testify whether in their opinion one was attached to the other. And in M'Kee v. Nelson, 4 Cowen, 355, the court say, "The opinion of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury." See Trelawney v. Colman, 2 Stark. 191. A witness may also give his judgment whether a person was intoxicated at a given time: People v. Eastwood, 4 Kernan 562; or whether he noticed any change in the intelligence or understanding, or any want of coherence in the remarks of another. Barker v. Comins, 110 Mass. 477. Nash v. Hunt, 116 Mass. 237.

In Steamboat Clipper v. Logan, 18 Ohio 375, it was held that a person who had been a captain and engineer of a steamboat, having examined a boat after an injury by collision, may state his opinion as to the direction from which the boat was struck at the time of the collision. There was no evidence that the witness had any special knowledge in regard to collisions, through observation or experiment; and the court does not rest the decision on the ground that the witness was an expert; but says there is "no objection to calling these men experts, if the name will render their testimony more unexceptionable; but it is not true as a legal proposition that no one but an expert can give an opinion to a jury. From the necessity of the case, testimony must occasionally be a compound of fact and opinion." And the court say that they can give no better illustration of their meaning than by the use of the language in M'Kee v. Nelson, a portion of which is quoted above.

It would also seem to be within the range of common knowledge to observe and understand those appearances, in marks or stains caused by blood or other fluids, which indicate the direction from which they came, if impelled by force.

The competency of this evidence rests upon two necessary conditions: first, that the subject matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and second, that the facts upon which the witness is called to express his opinion, are such as men in general are capable of comprehending and understanding.

When these conditions have been complied with or fulfilled in a given case, the court must then pass upon the question, whether the witness had the opportunity and means of inquiry, and was careful and intelligent in his observation and examination. It is not the mere qualification of the witness but the extent and thoroughness of his exam-

ination into the specific facts to which the inquiry relates, and the general character of those facts, as affording to one, having his opportunity to judge, the requisite means to form an opinion.

In the case at bar the admission of the evidence by the court involved the decision: 1. That the stain was not in the same condition, and did not exhibit the same appearance at the trial as it did when examined by the witness and cannot be reproduced to the jury; upon this as a matter of fact there is no question; 2. That the stain might in itself furnish indications from what direction it came, capable of being observed by a witness, who though familiar with blood and its qualities, had not made or seen experiments made with it or other fluids in this respect; and 3. That the witness had made that thorough, careful and intelligent observation of the appearances, which would entitle him to testify. We must take the decision of the court on this last point to be conclusive.

Whether the reasons the witness gave for his opinion of the direction of the stain were sound or unsound, does not affect the question of competency, and of course the defendant had full opportunity to test him by cross-examination, or to show by evidence or argument that his reasons were unsound.

We cannot say that such a witness, familiar with blood, its properties and appearance, with his opportunity to examine and the actual examination made by him, might not form and testify to a reliable opinion as to the direction in which the blood moved in making the elongated stain, although he had never made actual experiments of that kind; and we see no ground for sustaining this exception to the admission of the evidence.

Exceptions overruled.

VINTON v. PECK.

14 Mich. 287. (1866)

CAMPBELL, J. Peck sued Vinton upon a promissory note, dated June 2nd, 1862 and payable three months after date to the order of Z. H. Bullard, who endorsed it to Peck.

Vinton, upon the trial, set up in defense that the note was either altered or forged, claiming he gave no note for more than eight dollars, whereas the note sued on was for eighty. One George T. Clark was called for Peck, and swore that he had been a Conveyancer and Notary Public for twenty-five years, and was familiar with Vinton's handwriting, and that the note was genuine. He was then asked whether, in his opinion, the word eight had been altered to eighty since its execution. This was objected to, and the objection overruled, and an exception taken. He stated that he thought it had not been altered, and on cross-examination stated the "y" could not have been added, because of its relation to the letters. This testimony was proper. The witness was engaged in a business which would be quite apt to familiarize him with all the ordinary appearances of writings, and the addition of a letter, after a document has been finished, is so generally adapted to give it a peculiar and recognizable appearance, that no great amount of experience would be necessary to detect it in ordinary cases. The value of a witness's belief must depend upon circumstances, but it is proper to go to the jury like other questions upon the genuineness of writings. It is very true that the jury may examine the paper for themselves, and that opinions are not usually admissible where the jury can form their own conclusions unaided. But we do not think it would be safe in this country to adopt a rule which assumes such a degree of knowledge and skill among jurors.

It is also assigned as error that several witnesses were allowed to compare the note in suit with the appeal bond and affidavit on file in the cause, which were admitted to be signed by Vinton. It is claimed that they were not shown to be experts. In proving handwriting in general there is no rule which requires any particular amount of skill in the witness. Any one who has had the proper facilities, and who can swear to a knowlege of the handwriting in question, has always been admitted. There are undoubtedly questions presented at times, which require greater skill than others, but such cases stand on their own grounds. It is a matter of common experience that all persons who can write at all can attain some familiarity with the hand-

writing of others, and we can find no test which would be at all practicable, except that of leaving their skill and capacity to be determined by the jury who hear them examined.

A more serious question is, whether the comparison here resorted to was admissible at all. It has very commonly been said that a witness must obtain his knowledge of handwriting by seeing the party write, or from papers in his own possession which he knows to be genuine, by recognition or dealing mutually had on their credit. Proof by comparison of hands on the trial has not always been deemed competent, and there are many authorities which deny its admissibility at all. Upon a subject which has been so much discussed, and upon which there is so wide a variance of opinion, we think the safest course is to satisfy ourselves concerning the principles involved, and frame our conclusions accordingly.

It has never been required that a witness should have seen any particular number of specimens or acts of handwriting. On the contrary seeing a person write once, has been held sufficient.

In the case of ancient documents proof by comparison has always been permitted, although the comparison can only be made by proving the genuineness of papers not involved in the cause. Doe v. Tarver, Ry. and M. 141. The right to establish handwriting by comparison in other cases has been denied on two grounds: first, because the specimens for comparison may be unfairly selected, and second, because proof of the genuineness of the specimens would raise collateral issues which would encumber the case, and which the party could not be supposed to be ready to meet. Accordingly the rule has been inflexibly, and we think justly settled, that disputed papers which do not belong in the cause, and are not involved in the issue, cannot have their genuineness made a question of inquiry in the cause, and cannot therefore be made a basis of comparison for either witnesses or jury. Doe v. Newton, 5 Ad. & El. 514; Griffits v. Ivery, 11 Id. 322; Hughes v. Rogers, 8 M. & W. 123; Bromage v. Rice, 7 C. & P. 548. There is one English case in which the Court of Queen's Bench was equally divided upon the question whether, after an attesting witness had in his testimony stated several specimens of his signature (including his attestation) to be genuine, an expert might be allowed to compare them all (relevant as well as irrelevant) to ascertain whether the attestation was genuine. The course of the discussion on the bench elicited the most complete investigation of the various methods of proving handwriting which is to be found in the books, and while it seems dangerous to allow comparison by disputed documents and signatures, the reasons for allowing

it among those not disputed are very forcibly set forth,—Doe v. Suckermore, 5 A. & E. 733. Where papers are already in the case, it is held almost if not quite universally, that the jury may make the comparison for themselves. 1 Greenl. Ev. 578. Mr. Greenleaf gives it as his opinion that this comparison may be made with or without the aid of experts. In Doe v. Newton (before cited) it is said that the court should enter into this inquiry with the jury, but it is doubtful whether it was meant to intimate that witnesses should be examined for that purpose. The general English rule would seem to be that the jury must form their own opinions among themselves from the comparison. And the English authorities agree in saying that the objection that a jury may be illiterate cannot now have any weight. But it cannot be denied that, even among intelligent men, there is much difference in regard to the capacity of forming an accurate judgment by comparison, while all persons who can read and write can form some sort of an opinion. Experts can certainly aid a jury very much in these inquiries, and, if any are admitted, the degree of their skill cannot be nicely measured. But, as we have already remarked, we think the presumption cannot safely be raised that all jurors here can be qualified to form opinions for themselves upon questions of handwriting, and while, if capable, they may properly make comparison, it is safer and better, we think, to make sure that they receive such light as is accessible.

Where, as in the present case, the papers used as means of comparison are a part of the records in the cause, and undisputed, it is held by the authorities cited that the jury can compare them, and that a witness may also use them, to form an opinion concerning the handwriting;—and no objection can arise on the ground that they can have been specially selected as a standard. We should feel disposed to say—had not the doctrine become almost venerable from much repetition—that there is nothing in ordinary experience which could lead any one to suppose that a person cannot form a better judgment of resemblances in writing from having the specimens before him, than from any mere effort of memory. And we feel constrained to hold that a comparison of hands by witnesses, where there is an undisputed standard in the cause, or where documents are fairly before the jury upon the issues, is allowable.

There is no error in the judgment, and it must be affirmed.

CHRISTIANCY and COOLEY, JJ. concurred.

HAMMOND v. MARIAN.

54 N. Y. 398. (1873)

Appeal by Allen C. Varian, one of the defendants, from judgment of the General Term of the Supreme Court in the sixth judicial district, in favor of the plaintiff, entered upon an order denying a motion for a new trial, and directing judgment on a verdict.

This action was brought on a promissory note, dated March 10, 1863, for $125, purporting to have been made by the defendants jointly, payable nine months after date to Charles Ross or bearer.

LOTT, Ch. C. The note in question was properly admitted in evidence. Proof was given by the plaintiff of an admission by the defendant, Allen C. Varian, tending to show, and sufficient, if uncontradicted, to prove that he had made it, and other evidence was given of facts and circumstances in relation to its delivery to Ross, the payee, from which it might, in connection with the evidence of such admission, be inferred that it was signed by him. There can, therefore, be no question of the sufficiency of the proof to warrant the note to be read to the jury at the time it was offered and introduced.

After its introduction, one witness who had seen the defendant write his name once, and another who had never seen him write, but who had held his note, acknowledged and conceded to be genuine, were permitted to express their opinion and belief, against the defendant's exception, whether the signature was his. The objection taken to the testimony was, that they had not shown themselves sufficiently acquainted with the defendant's handwriting to testify as to its genuineness. This is not tenable. They had some means, although slight, of enabling them to judge whether the signature was that of the defendant, yet sufficient, in their belief, to express an opinion in reference thereto. The extent of their knowledge, and the weight or effect to be given to their opinion, were proper matters for the consideration of the jury. (See Greenleaf on Evidence, vol. 1, sec. 577.)

Judgment reversed on other grounds.

WILSON v. VANLEER.

127 Pa. St. 372. (1889)

On August 22, 1885, an issue *devisavit vel non,* wherein Joseph VanLeer and Caroline, his wife, in right of said Caroline, were plaintiffs, and Sidwell T. Wilson and Needham M. Wilson, executors of the will of Needham Wilson, were defendants, was formed to try whether or not a certain testamentary paper was a codicil to the last will and testament of Needham Wilson. The issue had been directed by the Orphans' Court upon an appeal by said executors from the decree of the register of wills, admitting said paper to probate.

Cornelius Carman, called by the plaintiffs, testified that he was a brother of Caroline VanLeer, and had known Needham Wilson from his own boyhood; that when the witness was ten or eleven years old, which was thirty-two years before the trial, he was living with Mr. Wilson and saw him write two or three letters to the witness's father; that in October, 1865, the witness was with Mr. Wilson at a hotel in Lancaster, and saw him write a memorandum of articles he wished to purchase and indorse his name on a check, and since then witness had not seen Mr. Wilson write. The witness was subjected to a rigid cross-examination, and testified to his belief that the signature and the whole of the paper shown him was in the handwriting of Needham Wilson.

MITCHELL, J. The competency of Cornelius Carman was in the first instance clearly a matter for the court, and no subsequent evidence having raised any dispute of fact upon it, the learned judge was right in saying that the court was the sole judge of competency, and refusing to allow the jury to review the ruling. Had the facts upon which the judge held him *prima facie* competent been denied or contradicted, it might have been proper to submit the whole matter to the final decision of the jury: Lee v. Welsh, 1 W. N. 453; but there was no such conflict as made that course necessary.

The learned judge was also within the line of authorities, in holding that Carman had sufficient knowledge of Wilson's handwriting to make him competent to testify concerning it. It is said to be sufficient if the witness has seen the party write but once, and then only his name: 1 Greenl. Ev. sec. 577; and probably no higher standard can be fixed for a definite rule, though, considering the untrustworthiness of opinions on handwriting in general (see note of Chief Justice Redfield to his edition of Greenleaf, vol. 1, sec. 578), such evidence ought to be

guarded with great caution. Nor in the nature of things is it possible to fix any arbitrary limit of time within which the witness must have seen the writing done. That must depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial judge. Carman's knowledge seems not only to have been extremely stale, but of the narrowest extent, and if the learned judge had held that it was too remote and unreliable to qualify him, we should not have been disposed to disagree with him. But the matter was within his discretion, and his conclusion was, as already said, within the line of the authorities. It was therefore for the jury and not for us to determine the weight to which the testimony should be entitled. The assignments of error in relation to Carman's testimony are therefore not sustained.

Judgment reversed, and venire de novo awarded on other grounds.

TOWER v. WHIP.

53 W. Va. 158. (1903)

BRANNON, J. This was an action of debt tried before a special judge, on a negotiable note in the Circuit Court of Mineral county, brought by M. C. Totten against Sandford Whip, resulting in a verdict and judgment for the defendant, from which he has sued out a writ of error.

The defendant pleaded *nil debet* and filed a plea No. 3 saying that "he did not make or sign the notes sued on," which were verified by affidavit.

The vital question in this case is, did Whip make the note? He denied doing so by pleas 1 and 3. On trial the plaintiff offered a witness as an expert, and proposed that he inspect Whip's signature to the affidavits of the four pleas filed by him and the signature of Whip on the note in suit, and say whether the same person made them and proposed to prove by him that in his opinion the same person made all the signatures; but the evidence was rejected. In West Virginia it is settled law that the genuineness of an instrument cannot be proven or disproven by comparison with other writings; as a general rule comparison of handwritings is not allowed. State v. Koontz, 31 W. Va. 127. I never could see the soundness of this rule; but it was well

settled common law in England until statute wiped it away, and generally, but not everywhere, prevailed in the United States. It came to this State from Virginia. We have always regarded this the Virginia rule; but if so, Hanriot v. Sherwood, 82 Va. 1, has overruled it. But concede such to be the law in West Virginia, yet, as the Supreme Court said in Moore v. United States, 91 U. S. 270, "the general rule of the common law disallowing a comparison of handwriting as proof of signature has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury." The disputed paper "May be compared with it by the jury." The disputed paper "May be compared with other writings by such person proved or admitted to be genuine and already properly before the court for other purposes, either as evidence in the case or as part of the record." 15 Am. & Eng. Encyc. of L. 266. The defense on the trial stated that it was not admitted that the signatures to the pleas were in Whip's handwriting but it was not denied. And is it not presumptive, in the case of a natural person, that a signature to a plea filed in court by him is his own, especially as it is certified to have been subscribed by him before the clerk? And he proffered it as his, and it would be *prima facie* his, until shown not to be his. It would be different with a paper not in the case. Here it was part of the record. Could it be questioned that the jury might compare the note with the pleas? I think not. But our question is, can an expert make a comparison of those papers and give his opinion? Yes, he can, because, if you once settle that a jury can do so, it is a subject of expert evidence. If the papers are such as to allow a comparison, expert evidence may be applied to them. Vinton v. Peck, 14 Mich. 287, is authority not only to allow comparison with other papers already in the case, but also to show that experts may be called to make the comparison, and that it is better that the jury have the aid of experts, as few of us are competent to do so with success. 1 Greenl. Ev. sec. 578 thus states the law: "Where other writings admitted to be genuine are already in the case; here the comparison may be made by the jury with or without the aid of experts." In Hardwick v. Sherwood, 82 Va. 1, expert evidence to make such comparison is held proper. In Springer v. Hall, 83 Mo. 693, it is held that such expert evidence may be used to compare. This case is cited by the defense to show that comparison cannot be made with paper made after suit, but there the defendant proposed to use his signature to his own pleadings to prove that he did not make the note.

Any amount of law can be cited to show that experts may compare writings and give their opinions. Rogers, Expert Test., sec. 133; State v. Thompson, 6 Am. St. R. 172. Much case law is cited to show that expert testimony is weak and unreliable. This may or may not, be so. Courts differ as to this. Many regard it valuable, as it surely is in certain cases. We pass no opinion, as its weight is for the jury. Being admissible, we are not able to say that it would not have had weight, and if such evidence might have been beneficial to the plaintiff, its rejection is error, as he was entitled to place before the jury all admissible evidence. Kerr v. Lunsford, 31 W. Va. 675.

Reversed.

MORRISON v. PORTER.

35 Minn. 425. (1886)

The plaintiff brought this action in the district court for Hennepin county to determine the defendant's adverse claims to certain land, and appeals from an order by Lochren, M., refusing a new trial.

DICKINSON, J. The defendant, the railroad corporation, has title to the land in controversy through a chain of conveyances running back to the plaintiff, if in fact the plaintiff executed a certain deed of conveyance in the year 1860, the execution of which the plaintiff disputes. The court found that it had been executed by her. The first point to be considered arises upon the admission in evidence of an instrument (Exhibit Y) containing a signature of the plaintiff admitted to be genuine, to enable a comparison to be made between that signature and the disputed signature in issue, Exhibit Y being not otherwise relevant to the issue. Expert witnesses were allowed to give their opinions, based upon such comparison. Upon the question thus presented, as to whether a writing, admitted to be in the hand of the person whose signature is in issue, may be received in evidence for the purpose of comparison, the authorities are so at variance that we are at liberty to adopt the rule of evidence which seems to be most consistent with reason, and conducive to the best results. At common law, and generally in the United States, it has been the rule that where other writings, admitted to be genuine, are already in evidence for other purposes in the case, comparison may be made between such writings and the instrument in question. If such a comparison is conducive to the ends

of truth, and is allowable, there would seem to be but little reason for refusing to allow a comparison with other writings admitted to be genuine, although not in evidence for other purposes.

The objections which have been urged to receiving other instruments, for the purpose of comparison, have been the multiplying of collateral issues; the danger of fraud or unfairness in selecting instruments for that purpose, from the fact that handwriting is not always the same, and is affected by age, and by the various circumstances which may attend the writing; and the surprise to which a party against whom such evidence is produced may be subjected. When the writings presented are admitted to be genuine, so that collateral issues are not likely to arise, nor the adverse party to be surprised by evidence which he is unable to meet, these objections seem to us to be insufficient as reasons for excluding the evidence. If such evidence has apparent and direct probative force, it should not be excluded unless for substantial reasons. In general, and from necessity, the authenticity of handwriting must be subject to proof by comparison of some sort, or by testimony which is based upon comparison, between the writing in question and that which is in some manner recognized or shown to be genuine. This is everywhere allowed, through the opinions of witnesses who have acquired a knowledge more or less complete, of the handwriting of a person, as having seen him write, or from acquaintance with papers authenticated as genuine. In such cases the conception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed, and given in evidence. It would seem that a standard generally not less satisfactory, and very often much more satisfactory, is afforded by the opportunity for examining side by side the writing in dispute and other writings of unquestioned authenticity; and this, we think, is in accordance with the common judgment and experience of men.

The evils that may be suggested as likely to arise from the selection of particular writings for the purposes of comparison, may be left, as all unfair or misleading evidence must be, to be corrected by other evidence, and by the intelligent judgment of the court or jury. In our opinion, such evidence is conducive to the intelligent ascertaining of the truth, and the receiving of it in this case was not error. We cite authorities sustaining this view, some of which go further in this direction than does our present decision. Tyler v. Todd, 36 Conn. 218; Moody v. Rowell, 17 Pick. 490, (28 Am. Dec. 31); State v. Hastings, 53 N. H. 452; Adams v. Field, 21 Vt. 256; State v. Ward, 39 Vt. 225; Farmers' Bank v. Whitehill, 10 Serg. & R. 110; Travis v. Brown, 43

Pa. St. 9; Chance v. Indianapolis & W. G. R. Co., 32 Ind. 472; Macomber v. Scott, 10 Kan. 335; Wilson v. Beauchamp, 50 Miss. 24.

Order affirmed.

STATE v. FLANDERS.

38 N. H. 332. (1859)

INDICTMENT, charging the respondent with the crime of forgery, in having altered, at Manchester, in said county, on the fourth day of August, 1857, a bond of that date, in the penal sum of forty thousand dollars, signed by himself as principal, and by Samuel Andrews and Luther Aiken as sureties, given and payable to Thomas P. Webber.

The principal questions before the jury were whether the signature of Aiken was upon the bond when the respondent made the alteration; the evidence being clear that Aiken never saw the bond before it was passed to Webber, except when he signed it, and never assented to any alteration after it was made and before the respondent passed or attempted to pass the bond to Webber as genuine.

SAWYER, J.

Another question in the case is, whether the testimony of Aiken, as to his impression, was properly received. He testified that he read the bond hastily when he signed it and could not say whether it had then been altered or not, but that he had an impression in regard to it. The government then asked what the impression was, to which the respondent objected. The objection has several aspects. An impression as to a past fact may mean personal knowledge of the facts as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection, and is therefore spoken of as an impression. This, perhaps, is the sense in which the word is most commonly used by witnesses, in giving their testimony. In this sense the impression of a witness is evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory, as the impress of personal knowledge, because of the dimness of the impression. If, therefore, the objection is to be considered as one taken to the general competency of such testimony, it is clear that it was properly overruled. An impression, however, may mean an understanding or belief of the fact, derived from some other source than personal observation, as the

information of others; or it may mean an inference or conclusion of the mind as to the existence of the fact, drawn from a knowledge of other facts. When used in these senses, it is not evidence; and the objection may be understood to be that enough appears in other statements of the witness, when considered in connection with the subject of his testimony, to show that he intended to use the word in one of these senses as his understanding and belief, or his inference and conclusion, and not as his recollection. It has been urged in the argument, that when the witness stated that he read the bond hastily, and could not say whether it had then been altered or not, he was fairly to be understood as meaning that he had no recollection founded upon his personal observation, as would enable him to testify from memory; and that, consequently, by the word impression, he must have meant an understanding or inference, resulting from the information of others, or the operations of his own mind, instead of his personal knowledge of the fact. If it was apparent to the court that the word was thus used, the objection is well taken. We think, however, that, taking the whole testimony together, it may be understood to mean that, although, from the slight attention which he gave the bond in his hasty reading, he cannot say positively whether the alteration had been made or not, he nevertheless had an impression upon his memory, derived from reading it, that it had not. At least, it may be said that the jury might so understand him, without doing violence to any fact or statement contained in his testimony. If it was susceptible of that construction, it could not be excluded by the court merely because a different interpretation might be put upon it, which would render it incompetent. If the parties choose to leave the testimony of a witness doubtful, by refraining to draw from him an explicit declaration of his meaning, when it is susceptible of two interpretations, one of which renders it competent and the other incompetent, it must be submitted to the jury, with proper instructions of course, as to how they are to regard it, when they have ascertained what his meaning really was.

In another view, the objection might have been sustained, if it had appeared in the case that objection was placed on that ground at the trial. When the witness stated that he could not say whether the bond had been altered or not, it might well be doubted how he intended to be understood in the subsequent statement that he had an impression in regard to it. If the respondent had objected that the witness should not be asked the question what his impression was, until it had first been ascertained whether he meant by the word impression, a recollection or not, the objection would have been sustained. It cannot be understood

to have been made on that ground. It is stated as a general objection, and, as such, must be understood as taken to the competency of the evidence, and not to the form of the question or other incidental matter, which, if stated at the trial, would have given the counsel for the government an opportunity to obviate it.

Verdict set aside and new trial granted on other grounds.

BENNETT v. BEAM.

42 Mich. 346. (1880)

MARSTON, C. J. The action in this case was brought to recover damages for breach of a contract to marry.

It is alleged as error that the plaintiff and her father were allowed to testify as to the effect of the alleged refusal to marry, upon her mind and feelings. That such evidence was admissible under the general allegations of the declaration we consider too clear to require argument. The effect upon her mind and feelings was one of the usual and natural results of the breach, and had an essential bearing upon the question of damages.

It is also alleged that it was not proper to show the financial standing of the defendant.

In this state it is a well settled legal axiom that the just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained. There are exceptions to this rule, but it would not be claimed that this case comes within them. Now the contract for a breach of which this suit was brought, was one for a life association of interests, and it is one of the most obvious facts that the pecuniary circumstances of the defendant, as well as his social position, would largely influence any one's estimate of the damages suffered. This would be so even if the woman had in no manner taken the man's property into account in engaging herself to him, but the law always supposes that property considerations are not ignored in these cases.

In cases like the present, what loss is it that the plaintiff has sustained by a breach of the contract? To determine this we must look at the surroundings and see what it was to which the defendant invited her. If it was to a home of poverty and a life of probable hardship and misery, the loss would apparently be small; but if it was a home pos-

sessed of and surrounded by all the comforts and even the luxuries of life, and where her social position in the circles in which she would move by right of the marriage would be the very best, the case would be exactly the opposite, because in such case there would be abundant promise of social and domestic happiness. But beyond this the very marriage confers certain rights in the husband's real and personal estate of which she cannot afterwards be deprived except by her own consent, and she would naturally and justly look to them as her security against becoming dependent through the accidents and misfortunes of life. It is all these that the breach of the marriage contract deprives the woman of, and she is allowed to prove them, not to show that he will be able to satisfy a judgment if she obtains one, but to measure the extent of her loss.

For the breach of an ordinary contract, as for the sale and delivery of goods, the wealth of the defendant can and should have no possible bearing in the case, as it could in no way enhance or lessen the damages sustained. In such a case the damages would be ascertained according to well settled rules dependent upon the condition of the market and other circumstances which the defendant's wealth could not to any appreciable degree affect. In this case a prospective participation in the wealth of the defendant is one of those things of which the plaintiff by the breach has been deprived, and goes therefore to the extent of the injury. Miller v. Rosier, 31 Mich. 478; Kelly v. Riley, 8 Am. 336; 106 Mass. 339. See also James v. Biddington, 6 C. & P., 331.

The judgment must be affirmed with costs.

SWAN and others v. COUNTY OF MIDDLESEX.

101 Mass. 173. (1869)

Petition to the county commissioners by Benjamin L. Swan and five others, heirs of Benjamin L. Swan, deceased, for a jury to estimate the damages sustained by taking, to widen High Street in Medford, a strip of land three feet and a half wide from the front of a lot on which was a dwelling-house; a fence and trees were on the strip taken. Trial before the sheriff of Middlesex, who returned with the verdict of the jury a certificate of his rulings as follows:

"At the trial the petitioners offered evidence tending to show the position of the fence, and the value of the trees to the occupants of the

house, and also evidence tending to show the cost of removing the fence and trees; and rested their case. The respondents then called a number of witnesses, all of whom had resided many years in Medford, and some been selectmen and assessors, and who all testified that they had knowledge of the value of the land in Medford, some of them from actual sales or purchases by themselves, and some of them from knowing of sales of others; they all testified in reply to questions by the petitioners, that they had no actual knowledge of the effect produced upon the value of the dwelling-house and lot, in a single instance, by widening the street in front, and narrowing the ground in front of the house. The respondents then inquired of each of the witnesses, what, in his opinion, would be the effect upon the value of the estate in question, of widening the street, and cutting off the land—and the trees. To this question the petitioners objected, both on the ground that the witnesses were not qualified as experts to answer the question, and because it was not a matter requiring any special knowledge in a witness as an expert, and therefore not a proper matter to be shown by an expert, but the witnesses were allowed to answer the question.

GRAY, J. It is well settled in this Commonwealth that, when the value of real estate is in controversy, opinions of persons acquainted with its value are admissible in evidence. These opinions are admitted, not as being the opinions of experts, strictly so-called, for they are not founded on special study or training or professional experience; but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have,—and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved. Dwight v. County Commissioners, 11 Cush. 203; Shattuck v. Stoneham Branch Railroad Co., 6 Allen 116, 117; Whitman v. Boston & Maine Railroad, 7 Allen 316, and cases there cited. The same rule has prevailed in courts of authority in other states. Kellogg v. Krauser, 14 S. & R. 137; Warren v. Wheeler, 21 Maine 484; Clark v. Baird, 5 Selden, 183. The knowledge requisite to qualify a witness to testify to his opinion of the value of the lands may either be acquired by the performance of official duty, as by a county commissioner or selectman, whose duty it is to lay out public ways, or by an assessor whose duty it is to ascertain the value of the lands for the purpose of taxation; or it may be derived from knowledge of sales and purchases of other lands in the vicinity, either by the witness himself or by other persons. Dickens v. Fitchburg, 13 Gray 546. Whitman v. Boston & Maine Railroad, 70 Allen 316. Russell v. Horn Pond Branch Railroad

Co., 4 Gray 607; Fowler v. County Commissioners, 6 Allen 97. On the question of the sufficiency of the knowledge of the witness, must be left to the discretion of the judge or officer presiding at the trial. Paine v. Boston, 4 Ala.; Shattuck v. Stoneham Branch Railroad Co., 6 Allen 117. When the matter in issue is the assessment of damages to land by the laying out of a public way, witnesses having the requisite knowledge may testify to their opinion of the comparative value of the lands immediately before and after the taking, and to the effect of the taking upon the value of the remaining land, by way of injury or benefit, Dwight v. County Commissioners, 11 Cush. 201; Shaw v. Charlestown, 2 Gray 107; West Newbury v. Chase, 5 Gray 421; Dickenson v. Fitchburg, 13 Gray 546; Shattuck v. Stoneham Branch Railroad Co., 6 Allen 116, 117.

Applying these rules to the present case, we are of the opinion that there is no ground for sustaining the petitioners' exceptions to the rulings of the sheriff. The only objections taken at the trial, so far as they applied to each of the witnesses, were to the admission of the question, "what in his opinion would be the effect, upon the value of the estate in question, of widening the street and cutting off the land and trees?" and to the answer to this question given on direct examination. The grounds assigned for these objections were twofold, because the witnesses were not qualified to answer the question, and because it did not relate to a matter upon which the opinion of any witness would be admissible. Neither of these grounds is tenable.

Verdict accepted

LYNCH v. SMITH.

104 Mass. 52. (1870)

Tort in the plaintiff's name by his next friend for injuries alleged to have been caused on December 3, 1866, by the negligence of the defendant's servant in driving a pair of horses, drawing a hack, over the plaintiff, who at the time of the accident was crossing Henly Street in Charlestown and using due care. The answer denied that the driver was negligent, and that the plaintiff used due care.

The plaintiff called his school-teacher, Sarah Browers, as a witness, "and offered to show by her, and by others, that, in her and their opinion, the plaintiff was capable of exercising ordinary care in travelling

along and across the streets through which he was called to pass in going to and returning from school, and was competent to go to and from school unattended; but the judge ruled the testimony incompetent and inadmissible, and refused to receive it."

CHAPMAN, C. J. The plaintiff's declaration alleges that the defendant was driving a hack drawn by a pair of horses, in and along Henly Street in Charlestown, by his servant, and carelessly ran over the plaintiff (who was crossing the street and using due care), and injured him. The answer puts these allegations in issue.

It appeared in evidence that the plaintiff was a child four years and seven months old, and of the ability and intelligence of the average of children attending the public schools of the age of five years, and was attending the common school when the accident happened.

The question, whether a child like the plaintiff is of such capacity that he may be safely trusted to go to and from school alone, is one of fact, and not of law. Its importance arises from the necessity that exists, in an action like this, to prove the due care that he alleges. In an action for a wilful assault and battery in the street, it would be immaterial. But in an action for negligence, either the plaintiff, or some one on his behalf, must use due care, so that his own negligence shall not have contributed directly to the injury. On this point, the testimony of the school-teacher, merely expressing her opinion of the capacity of the child, was properly excluded. Yet, in connection with a description of the child, an opinion of a person acquainted with him, and having had opportunity to observe him, as to his quickness of observation and comprehension, as compared with other persons, would be admissible. The statement of such an opinion, as to whether he was physically large or small, strong or weak, and quick or slow of movement, in comparison with others, would be according to every day's practice; and when related to the exhibition of mental qualities, it would be of the same species. There is a class of evidence of this character which necessarily involves the statement of opinion. We have had occasion to consider it recently in Commonwealth v. Dorsey, 103 Mass. 412.

Exception sustained on another ground.

VANDINE v. BURPEE, & another.

54 Mass. 288. (1847)

This was action of trespass upon the case, brought against Amos Binney and Nathaniel Burpee, to recover damages for injury alleged to be done the plaintiff's garden and nursery in Cambridge, by smoke, heat and gas, proceeding from their brick kilns, made and burnt in a brick yard near said garden. The defendants severally pleaded the general issue.

DEWEY, J. The only objection, now urged to the ruling at the trial, is the admission of the testimony of Willett and Walker, as to their opinion of the amount of damages sustained by the plaintiff, by the injuries which they had already specified in detail.

As a general rule, witnesses are to testify to facts, and the jury are to draw the inferences and form the opinions which are to govern the case. In the application of this principle, it has been sometimes supposed that it should be carried so far as to exclude the opinion of witnesses as to the value of property which is in controversy; and decisions to this effect are found in the New Hampshire Reports. 3 N. Hamp. 349; 6 N. Hamp. 462; 10 N. Hamp. 130; 11 N. Hamp. 397. The case cited from 8 Shepley, 23 Wend. 354, and 14 S. & R., sanction the contrary doctrine.

It seems to us that it would be impractical to dispense with this species of testimony, in many actions of trover for personal property, where no details of facts could adequately inform the jury of the value of the articles. The opinion of a witness, as to the value of a horse, is much more satisfactory evidence than a detailed statement of his size, color, age, etc., to give the jury the requisite information, to enable them to assess damages for the conversion of such a horse. In the present case, the evidence of opinion was offered under the most favorable circumstances for its admissions. The witnesses were men having practical experience with the subject of cultivating fruit trees and shrubs; they had already stated, in detail, to the jury, the nature and extent of the injury so far as description of that kind could add; also their opinions as to the amount of damage occasioned by the injury, of which they had before testified.

The court are of the opinion that the testimony was competent.

Exceptions overruled.

C. & E. I. R. R. CO. v. WALLACE.

202 Ill. 129. (1903)

This is an action, brought by appellee against the appellant company to recover damages for personal injury.

MR. CHIEF JUSTICE MAGRUDER delivered the opinion of the court.

Counsel for the appellant company urge only two points upon our attentions as reasons for asking the reversal of the judgment of the Appellate Court. These two points are, first, that the trial court erred in refusing to sustain objections, made by appellant to certain hypothetical questions asked of expert witnesses testifying in behalf of appellee upon the trial below; and, second, that the court below erred in sustaining the demurrer to the plea of the Statute of Limitations, which was filed to the first additional count.

It seems to be generally settled by the great weight of authority, that a hypothetical question, addressed to an expert witness, is not improper, simply because it includes only a part of the facts in evidence, provided the testimony tends to establish such facts as are embodied in the question. (Rogers on Expert Testimony, 2d ed., sec. 27). This precise point has been decided by this court in Howard v. People, 185 Ill. 552, where we said (p. 560): "There was evidence tending to prove each of the facts stated in the hypothetical questions upon which the opinions of witnesses were asked, and that was all that was necessary. (Thompson on Trials, sec. 604, *et seq.*) Whether the facts, stated in a hypothetical question, are sufficiently established by the proof is to be decided by the jury. 'The fact, that a question is a hypothetical one, implies that the truth of some statement of facts is assumed for a particular purpose, and, if such a question could be based upon undisputed facts alone, it would never be asked in any case where an issue of fact arose.' (Underhill on Evidence, p. 272.) To require the court to determine in advance that questions so put embraced all the facts would be to take from the jury the weight to be given to the evidence." The ruling of the Howard case upon this subject was subsequently referred to and adopted in Chicago and Alton Railroad Co. v. Harington, 192 Ill. 9, where it was said: "A hypothetical question may be put to a witness, if there is evidence tending to prove the facts stated in the question."

The rule, that a hypothetical question is not improper because it includes only a part of the facts in evidence, is sustained by the decisions in other States, as well as those in Illinois.

In Cole v. Fall Brook Coal Co., 159 N. Y. 68, it was said: "In framing a hypothetical question, counsel may base it upon the hypothesis of the truth of all the evidence, or upon the hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. The question is not improper simply because it includes only a part of the facts in evidence. (Stearns v. Field, 90 N. Y. 640.) If framed upon the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist, provided there is proof sustaining those, upon which the question is based. * * * He may assume any state of facts which there is evidence to prove, and have the opinion of the expert upon the facts assumed."

The question is ably discussed in the case of Goodwin v. State, 96 Ind. 574, where it is said: "If the court were required to determine whether the hypothetical question correctly stated all the facts, it would be compelled to usurp the functions of the jury. If the court were required to determine whether all the facts were stated, it would be compelled to wrest from the jury the right to determine the credibility of witnesses. If the hypothetical question were required to embrace all the facts, then there would be an end to all certainty in trials, for confusion and endless wrangling must inevitably flow from such a rule."

The rule is thus stated in 8 Encyclopedia of Pleading and Practice, pp. 755, 757): "Hypothetical questions to an expert witness may be framed either upon all the facts in the case, or upon any part of the facts assumed to be true, which is sufficient in itself. * * * It must be based upon facts in evidence, but may be addressed to any reasonable theory which may be taken of them." (See also Filer v. New York Central Railroad Co., 49 N. Y. 46.) It is said in some of the authorities that, where such a hypothetical question does not embrace all the facts, the opposing counsel can on cross-examination ascertain from the witness, whether such omitted facts would in anywise modify or change the opinion of the witness, whether such omitted facts would in anywise modify or change the opinion of the witness. Thus in Stearns v. Field, 90 N. Y. 640, the court says: "It is now argued by the appellant that the question is defective in that it did not state enough. * * * If, in the opinion of the counsel, there was evidence other than that supposed proper for the witness to consider, his attention should have been called to it upon cross-examination. Such a question is not improper because it includes only a part of the facts in evidence. (Stearns v. Field, 90 N. Y. 640.)

So, in the case at bar, if the hypothetical questions, addressed by counsel for the appellee to the expert witness, omitted facts claimed by appellant to have been proven, and if the appellant believed that such omitted fact, as for instance those relating to childbirth, miscarriage, change of life or sedentary habits, might have had a bearing upon the opinions of the witnesses, counsel for appellant should have called the attention of the witnesses to such omitted matters upon cross-examination.

Judgment affirmed.

THE PEOPLE v. LEHR.

196 Ill. 361. (1902)

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court.

This is a writ of error to the Appellate Court for the Second District, to reverse a judgment of that court affirming a judgment of the Circuit Court of Peoria county acquitting defendant in error of a violation of the act entitled "An act to regulate the practice of medicine in the State of Illinois," etc. (Hurd's Stat. 1899, p. 1143.)

The only criticism made upon the ruling of the Circuit Court in the exclusion of testimony is, that it refused to allow a physician, Dr. Edward Hasson, to answer the question, "State whether or not, in your opinion, a person prescribing a medical device, claiming that it will cure rheumatism, etc., would be regarded as practicing medicine, as you understand the term?" Manifestly, the question was improper. The statute defines the practicing of medicine, and it was for the jury, and not for a witness, even though he might be called an expert, to say whether certain conduct amounted to the practice of medicine. In other words, this question seeks to have the witness decide the very ultimate question which the jury had sworn to try. The court properly sustained the objection to it.

Judgment affirmed.

SEXTON v. LAMB.

27 Kan. 426. (1882)

The opinion of the court was delivered by BREWER, J.

The court over the objection of defendant, admitted the testimony of several witnesses that they had been in the ice business in the city of Leavensworth for a series of years, and that with ice properly handled and managed, only a certain per cent. was lost by melting, etc. The question now presented is, was such testimony competent for the purpose of determining what amount of ice was originally in the ice-house? It is true that the most direct testimony would be that of those who put ice up, or of parties who measured the ice after it was already in the ice-house; and yet we think such testimony was competent, and tended to show the amount of ice originally there. Counsel call it expert testimony, and say that it is not legitimate expert testimony; and yet it is the testimony of those experienced in the business of handling ice as to waste in such handling, and therefore we think competent testimony. It tends most clearly to show either that the amount of ice claimed was not originally there, or that the defendant, or manager, or some other party had made improper disposition of such ice; for if ice properly handled loses in ordinary sale by retail only from 30 to 50 per cent., and if only 160 to 170 tons are reported as sold, then it follows that either the ice was improperly handled and managed by the agent, or that sales made were not reported, or that some parties had improperly taken ice from the ice-house, or else that the amount of ice originally reported was not there; and while this was not the most direct and positive testimony, yet it certainly was testimony competent to be considered, and testimony, in the absence of more direct and positive testimony, sufficient to sustain and uphold the conclusions of the trial judge. It is certainly testimony which, presuming good faith on the part of the agent, and good faith on the part of the defendant, tends strongly to show that there was a great mistake as to the amount of ice which in fact he had originally put up in the ice-house.

Affirmed.

All the Justices concurring.

LOWMAN v. THE STATE.

109 Ga. 501. (1899)

LUMPKIN, P. J. At the August term, 1899, of the Superior Court of Dawson county, Morgan Lowman was convicted of the murder of Benjamin Anderson, and sentenced to be executed. The accused made a motion for a new trial, which was overruled, and the case is here for review.

A witness for the accused, who was present at the homicide and who had given his version of what had occurred, was asked if at a certain juncture the time had not come for the accused—"to either run or fight." The answer would have been in the affirmative, but it was properly rejected. Allowing this testimony to go to the jury would have been permitting the witness to express his mere opinion as to a matter which did not fall within the domain of "opinion evidence." The nature of the emergency in which the accused was placed by the conduct of the deceased, and the manner in which it should have been met, were matters for determination by the jury and not by the witness.

Judgment reversed on another ground.

All the Justices concurring.

JONES and FULLER.

19 S. C. 66. (1882)

MR. JUSTICE MCIVER. This was an action to recover damages for a breach of promise of marriage. The contract and the breach thereof were fully established, not only by the admission in the pleadings, but also by testimony adduced at the trial, and the only question for the jury was as to the amount of the damages.

The plaintiff, after adducing testimony as to the contract and its breach, offered evidence tending to show the damages which she had sustained. Amongst other witnesses offered for this purpose, Dr. E. G. Simpson was examined, who testified "that he had known the plaintiff from her infancy, having been the family physician; that the social standing of the family was as good as any in the country; that the plaintiff was particularly bright and attractive, and that

she was well educated; that her engagement to Fuller was well known in the community, and also the treatment which she had received from Fuller; that he thought she had been seriously damaged."

This witness was then asked the following question: "From what you know of all the facts and circumstances, how much was the plaintiff damaged?" To this question the defendant objected, and his objection being overruled, the witness answered as follows: "That he thought the plaintiff had been seriously—somewhere from $5,000 to $10,000." The next witness offered was Col. John G. Williams, who after testifying substantially as Dr. Simpson had done, was asked the same question, as to what he thought was the amount of damages sustained by plaintiff, to which, after objection, which was overruled, he replied: "Her damages are incalculable in dollars and cents—certainly not less than $10,000."

No testimony was offered on the part of the defense, and the circuit judge, after instructing the jury that the only question for them to determine was the amount of damages, the contract and its breach having been admitted by the pleadings, proceeded to charge the jury.

The jury found a verdict in favor of the plaintiff for $9,000; and a motion for a new trial, on the minutes, having been refused, the defendant appealed from the judgment entered on the verdict on the following ground: "Because his Honor erred in allowing the witnesses, Dr. E. G. Simpson and Col. John G. Williams, to state to the jury their opinions as to the damages inflicted upon the plaintiff by breach of contract of marriage by the defendant."

While much has been written by elementary writers, and in the opinions of the courts, as to the admissibility of the opinions of witnesses as evidence, we are not aware of any case in which the precise question raised by this appeal, has been determined. We must, therefore, resort to the general principles of evidence, and from them deduce the rule applicable to this particular case.

There can be no doubt that, as a general rule, a witness is not at liberty to express an opinion, but must confine himself to the statement of fact but there is little doubt that this rule is subject to many exceptions. This will be seen by reference to the case of Commonwealth v. Sturtivant, 117 Mass. 122, and the note to that case as reported in 19 Am. Rep. 410, as well as to the case of State v. Pike, 40 N. H. 399, reported also in 6 Am. Rep. 533; especially the dissenting opinion of Doe, J., which afterwards received the sanction of the same court in Hardy v. Merril, 50 N. H. 227, 22 Am. Rep. 41

where the case of the State v. Pike was overruled. In these cases will be found elaborate discussion of the subject and very full collections of the authorities.

In 1 Whart. Ev. § 511, the writer, in discussing this subject, after mentioning many instances in which exceptions to the general rule have been allowed, lays down the following principle: "Whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury, or when language is not adequate to such realization, then a witness may describe it by its effect on his mind, even though such effect be opinion." Again, in section 450, the same author, in showing that the exception to the general rule is not confined to the case of the testimony of an expert, speaks of the admissibility of opinions as to the amount of the damages caused by another's act, in these words: "When the thing damaged is one of every-day use, whose depreciation an ordinary observer can estimate, then such an observer may be called to express his opinion of the extent of the damage sustained. If the facts which form the basis of such an opinion can be specified, then they must be stated; if the conclusion is one which the jury can draw, then to the jury must be left the drawing the conclusion. But when, as is often the case, those facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by witnesses."

In Commonwealth v. Sturtivant, *supra,* it is said: "The exception to the general rule, that witnesses cannot give opinions, is not confined to the evidence of experts, testifying on subjects requiring special knowledge, skill or learning, but includes the evidence of common observers, testifying to the results of their observation made at the time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the ground —the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice."

In Hardy v. Merril, it is said: "Opinions of witnesses, derived from observation, are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained."

From these authorities we deduce the following conclusions: First. That the exception to the general rule, that the opinions of witnesses are not competent evidence, is not confined to the case of expert testimony. Second. That while it is necessary that the witness should first state the facts upon which he bases his opinion, where the facts are such as are capable of being reproduced in language, it

is not necessary to do so where the facts are not capable of reproduction in such a way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion. Third. That such evidence is competent from the necessity of the case.

Now, to apply these principles to the case under consideration: The only question for the jury was as to the amount of damages sustained by the plaintiff, and this question was to be determined by the evidence adduced. The witnesses whose testimony was objected to, were not strangers who were called upon to express an abstract opinion as to the amount of damages which a lady would sustain by the breach of promise of marriage, but they were intimate acquaintances, who knew well the social position of the plaintiff, her temperament and disposition, and all her surroundings, and from the knowledge thus acquired they formed their estimate of the damages which she had sustained. It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things, upon which they based their estimates, so as to make the same palpable to the minds of the jury. How could they express in language the degree of sensibility of the lady, or the numerous other impalpable things which went to make up their estimate of the amount of damages which she had sustained. We think it was just one of those cases where, the language of the eminent author, Wharton, the "facts can be best expressed by the damage they cause."

In our judgment, therefore, there was no error in admitting the testimony of these witnesses.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

I. C. R. R. CO. v. THE PEOPLE.

143 Ill. 434. (1892)

This is a petition for a mandamus, filed on April 17, 1891, in the Circuit Court of Alexander County in the name of the People by the State's Attorney of that county, against the Illinois Central Railroad Company to compel that company to cause all of its regular passenger trains coming into the city of Cairo to be brought down to the passenger station at the intersection of Second and Ohio Levee

streets in that city, and there stopped a sufficient length of time to receive and let off passengers with safety.

MR. JUSTICE MAGRUDER delivered the opinion of the court:

One of the witnesses of the company, upon the trial below, who was an assistant of appellant's second vice-president, was asked the question whether the fast mail train was a regular passenger train, but, upon objection made, was not allowed to answer. The refusal of the court to permit him to answer is claimed by the appellant to have been erroneous, but we think the ruling of the trial judge was correct. The witness was asked to decide the very question, which the court trying the case without a jury was called upon to decide. A witness is not permitted to give his opinion as an expert in reference to a matter, which does not involve a question of science, skill or trade. To determine whether a train is a regular passenger train is not a subject, which "so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it." (Linn v. Sigbee, 67 Ill. 75; Wight Fire Proofing Co. v. Poczekai, 130 id. 139). The opinions of witnesses should not be asked in such a way as to cover the very question to be found by the jury or court. (C. & A. R. R. Co. v. S. & N. W. R. R. Co., 67 Ill. 142.) Where the matter inquired about requires no special knowledge, and may be determined by a jury upon a sufficient description of the facts in regard to it, it is not proper to receive the testimony of experts. (Hopkins v. Ind. & St. L. R. R. Co., 78 Ill. 32; City of Chicago v. McGiven, id. 347; Pennsylvania Co. v. Conlan, 101 id. 93.)

Judgment affirmed.

RES INTER ALIOS.[1]

HODGES v. PERCIVAL.

132 Ill. 53. (1890)

MR. JUSTICE MAGRUDER delivered the opinion of the court:

This is an action of case begun by the appellee on February 12, 1887, in the Superior Court of Cook county, against the appellant to recover damages for injuries suffered through the falling of an

[1] Hughes on Evidence, p. 35.

elevator in a building owned by the appellant. The jury returned a verdict of $1500.00 for the plaintiff below, and judgment was rendered on the verdict. This judgment has been affirmed by the Appellate Court and from the latter court the case is brought before us by appeal.

In the course of the trial below, the plaintiff introduced a witness by the name of Ellithorpe, who testified that he had been in the elevator business about ten years, that what is known as the air-cushion was in common use in December, 1886, that its object was to prevent injury from the fall of an elevator by confining air at the bottom of the hatchway so as to resist the falling body, that it had been tested and found effective for the prevention of injuries, that such an air-cushion was then (at the time when the witness was testifying) used in the defendant's building, that it was put in in the fall or winter of 1886 after the accident happened. Defendant objected to the statement that an air-cushion had been put in after the accident; the objection was overruled and exception taken.

The admission of the testimony, that an air-cushion was put in the elevator shaft after the happening of the accident is the only ground for reversal which is presented to our attention by appellant's counsel. We think that the testimony was improper and should have been excluded.

Evidence of precautions taken after an accident is apt to be interpreted by a jury as an admission of negligence. The question of negligence should be determined by what occurred before and at the time of the accident, and not by what is done after it. New measures or new devices adopted after an accident do not necessarily imply that all previous devices or measures were insufficient. A person operating a passenger elevator is bound to avail himself of all new inventions and improvements known to him, which will contribute materially to the safety of his passengers whenever the utility of such improvements has been thoroughly tested and demonstrated and their adoption is within his power, so as to be reasonably practicable. For this reason it was proper to show that a valuable device for securing safety was known to the defendant, and its use neglected by him, before the accident; but it would seem unjust that he could not take additional precautions after the accident without having his acts construed into an admission of prior negligence. Persons, to whose negligence accidents may be attributed, will hesitate about adopting such changes as will prevent the recurrence of similar accidents, if they are thereby to be charged with an admission of their responsibility

for the past. The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not necessarily to be regarded as tantamount to a confession of past neglect.

We are aware that there is a conflict of authority upon this subject. In Pennsylvania evidence of precautions taken after the accident has been held competent. (Penn. R. R. Co. v. Henderson, 51 Penn. 315; Westchester & P. R. R. Co. v. McElwee, 67 id. 311; McKee v. Bidwell, 74 id. 218.) But it has been held, that such evidence is not admissible, in New York, Connecticut, Iowa and Minnesota. (Dougan v. Champlaint Trans. Co., 56 N. Y. 1; Baird v. Daly, 68 id. 547; Salters v. Del. & H. C. Co., 3 Hun, 338; Payne v. Troy & Boston R. R. Co., 9 id. 526; Morrell v. Peck, 24 id. 37; Cramer v. City of Burlington, 45 Iowa 627; Hudson v. C. & N. W. R'y Co., 59 id. 581; Morse v. Minneapolis & St. Louis R'y Co., 30 Minn. 465; Nalley v. Hartford Carpet Co., 51 Conn. 524.)

In the last case the Supreme Court of Connecticut reviews the cases in the other States, and, in deciding against the admissibility of such testimony, uses the following language: "If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time." Black, in his work on Proof and Pleadings in Accident Cases (page 37, sec. 30), announces, as the result of his examination of the authorities, that "precautions taken after an accident are not, in general admissible for the purpose of showing prior negligence."

But it is not every error committed by a trial court which will justify a reversal of the judgment. If it can be plainly seen from the record, that the error complained of could not have possibly worked any injury to the complaining party, and the verdict must have been what it was in spite of such error, then the judgment ought not to be reversed. In this particular case we do not think that the admission of the testimony objected to could have worked any harm to the defendant.

Judgment affirmed.

THE CITY OF DELPHI v. LOWERY, Admx.

74 Ind. 520. (1881)

ELLIOT, J. The questions, which the record of this case presents, arise upon the ruling denying appellant's motion for a new trial.

William A. Lowery, the appellee's intestate, lost his life by drowning in the Wabash and Erie canal, at a point within, or near, the corporate limits of the city of Delphi. There was evidence tending to prove that the intestate's death was attributable to the negligence of the appellant in failing to place barricades about the dangerous place, or to guard it by signals or warnings of danger. There was also evidence tending to show that it was the duty of the city to properly protect passengers from danger, inasmuch as one of the public streets of the city either ran up to and across the dangerous place or terminated in very close and direct proximity to that point.

Evidence was given by the appellee, that other persons had received injuries at the place where the deceased was drowned, at times anterior to his death. This the appellant contends with vigor and ability was erroneous. There is some conflict in the authorities. In Collins v. The Inhabitants of Dorchester, 6 Cush. 396, such evidence was declared incompetent. It was said to be "Testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet." In support of the conclusion of the court, the following authorities were cited: Standish v. Washburn, 21 Pick. 237; 2 Stark. Ev. 381; 1 Greenl. Ev. secs. 52, 448. The cases of Aldrich v. Pelham, 1 Gray 510; Kidder v. Dunstable, 11 Gray, 342; Blair v. Pelham, 118 Mass. 420, assert substantially the same doctrine as Collins v. Dorchester, *supra*.

In Darling v. Westmoreland, 52 N. H. 401, the doctrine of Collins v. Dorchester is vigorously assailed in an unusually able and elaborate opinion, and the opposite doctrine declared to be correct, both upon reason and authority. In the recent case of Moore v. The City of Burlington, 49 Iowa 136, the court adopted in effect, although not expressly, the rule declared in the New Hampshire case. The Supreme Court of Illinois, declared, in the case of The City of Chicago v. Powers, 42 Ill. 169, that such evidence was competent. It was said in that case: "It is insisted that the court erred in admiting evidence that another person had fallen through the same bridge. If this evidence was admissible for any purpose then it was not

error. The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate, at the same place, and from a like cause, it would tend to show a knowledge on the part of the city, that there was inattention on the part of their agents having the charge of the bridge, and that they failed to provide further means for the protection of persons crossing on the bridge. As it tended to prove this fact, it was admissible; and, if appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose." In Kent v. The Town of Lincoln, 32 Vt. 591 it was held competent to prove that other persons than the complainant had, at previous times, been injured by the same defect in a highway. A simllar ruling was made in the case of Quinlan v. The City of Utica, 11 Hun 217. This case was affirmed without comment by the Court of Appeals, 74 N. Y. 603. In the City of Augusta v. Hafers, 61 Ga. 48, S. C. 34 Am. R. 95, the doctrine maintained by the cases cited was declared and enforced. The Supreme Court of the United States, in The Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454, held that it was competent for the plaintiff, in an action for injury resulting from fire communicated by the locomotives of a railway company, to prove that, during the summer preceding the burning of the plaintiff's property, fire was often scattered from the locomotives of the defendant when passing plaintiff's property. In Hoyt v. Jeffers, 30 Mich. 181, it was held proper to prove that sparks had, at other times than that on which the injury sued for occurred been emitted from a chimney. The doctrine of the cases cited is supported by many adjudicated cases, among them: Aldridge v. The Great Western R. W. Co., 3 M. & G. 515; Huyet v. Philadelphia, etc., R. R. Co., 23 Pa. St. 373; St. Joseph, etc., R. R. Co. v. Chase, 11 Kan. 47; Longabaugh v. The Virginia City, etc., R. R. Co., 9 Nev. 271; Penn. R. R. Co. v. Stranahan, 79 Pa. 405; Annapolis, etc., R. R. Co. v. Gratt, 39 Md. 115; Dougan v. Champlain, etc., Co., 56 N. Y. 1; Field v. The New York, etc., R. R. Co., 32 N. Y. 339.

This court has adopted and enforced this doctrine. In the case of The Pittsburgh, etc., R. W. Co. v. Ruby, 38 Ind. 294, this question was exhaustively discussed, and the point expressly ruled. It was there held that evidence of specific facts was competent for the purpose of charging the corporation with notice. We are unable to perceive any difference in principle between the case in hand and the class of cases of which those last cited are types. If specific acts are proper

for the purpose of showing notice to the owners of machinery or the employers of servants, it must be competent for the purpose of showing notice to a municipal corporation, that there is a dangerous place within or very near the limits of the highway. The cases directly ruling the point here under immediate mention outweigh the cases in Massachusetts, for the latter are built all upon a single and not very well considered case. The doctrine of the cases in that court cannot be reconciled with the doctrine of the class of cases represented by The Pittsburg, etc., R. R. Co. This last doctrine has been recognized as sound by the Supreme Court of Massachusetts, and that court, able and distinguished as it confessedly is, has, it seems to us, thus sanctioned a doctrine inconsistent with that of Collins v. Dorchester. Gahagan v. Boston, etc., R. R. Co., 1 Allen 187; Ross v. Boston, etc., R. R. Co., 6 Allen 87. It also seems to us that the doctrine of Collins v. Dorchester can not be harmonized with Crosby v. Boston, 118 Mass. 71, but we deem it unnecessary to prolong this opinion by a discussion of the conflict between these two cases.

Reversed on another ground.

COPPERMAN v. PEOPLE.

56 N. Y. 591. (1874)

CHURCH, C. J. The plaintiff in error was convicted of receiving property, knowing it to have been stolen. He was a pawnbroker, and seems to have been a man of fair standing and reputation. We are restricted to a consideration of the legal questions presented.

The alleged offense, for which the prisoner was indicted, was committed on the 30th of June, 1871, and consisted of receiving two parcels of sewing silk, of about one pound each, of one Robinson, who had stolen the same from the store of Gardner & Co. Robinson was the principal witness for the people. He was, and had been for a considerable period, a clerk in the store of Gardner & Co., and testified that he stole the silk in question from his employers' store and sold it to the prisoner for six dollars, its real value being $17.50. He also testified that he had, on ten or twelve previous occasions during the preceding year, stolen similar goods from his employers, and on the first two occasions pawned the goods, and afterwards sold the pawn tickets to the prisoner, and on the other occasions sold the prop-

erty in the first instance to him, and in all cases at about the same sum proportionate to the value of the property. The evidence as to prior transactions was given and received upon the question of guilty knowledge, and the exceptions relate to the ruling of the court, of what was said and done upon these occasions. It is a general rule, and one that should be strictly observed, that it is incompetent upon the trial for one offense to prove that the accused has committed another not connected with it. Nor can particular acts of criminality or immorality not connected with the facts constituting the crime for which the accused is being tried be thrown into the scale against him, to prejudice the jury or create a probability of guilt. An apparent exception to this rule exists in cases where knowledge of some particular fact is an ingredient of the crime, and must be affirmatively proved. It may be doubted whether such evidence should be called an exception to the general rule. Although facts may be proved not connected with the transaction constituting the crime, to establish guilty knowledge, yet they may be regarded as competent because they tend directly to prove an essential element of the crime, to-wit, knowledge of a given fact. A familiar instance is the case of passing forged bills or notes. The passing a counterfeit bank bill is not, *per se,* a crime, but it is essential that the person should know that it is counterfeit, and hence it has been held competent to show that he had passed on other occasions, or had in his possession, similar bills, because such evidence bears directly upon his knowledge of the character of the bill passed, for which he is indicted; but the strength of such evidence depends upon the number of other bills, and all the circumstances connecting him with them. So it is not *per se* criminal to receive stolen property, but it is a crime to receive it knowing it to have been stolen. There may be circumstances attending the receipt of the property from which alone an inference of such knowledge might be properly made, and within certain restrictions it has been established, and, I think, properly, that the receiving of other similar property from the same person, with a guilty knowledge, may be given in evidence upon the question. I agree with the learned counsel for the prisoner, that guilty knowledge is a delicate question, and I concur fully with the position that courts should be cautious in receiving evidence of outside facts upon that question, and that all facts which do not directly bear upon the question should be excluded. In the Coleman case, 55 N. Y. 81, recently decided by this court, it was intended to lay down a strict rule upon this subject, but the principle was recognized that such evidence may be admissible.

In the Oddy's Case (2 Dennison C. C. 272), cited by the counsel for the accused, the offer was to prove that the prisoner had other stolen property in his possession. This was clearly incompetent, for the reason stated by Campbell, Ch. J., that "it would not be direct evidence of the particular fact in issue, viz., that at the time of his receiving specific articles he knew them to be stolen." Nor would it legitimately tend to prove that the accused knew that an article received of one person today was stolen, by showing that on some other occasion he received another article from another person, not connected with the first, knowing it to have been stolen. Such evidence only tends to create vague and uncertain probabilities. But if a person has frequently received articles of property of a particular kind from another, knowing that such other person stole them from a particular person or place, and he is offered on a subsequent occasion similar articles by the same person and under like circumstances, it does directly tend to establish that the articles thus offered were also known to be stolen. It is a natural and necessary inference, and one which every reasonable man would draw. It is an inference derived from the laws of human action. The rule adopted in Reg. v. Dunn (1 Moody C. C. 146) was approved in the Coleman case and we see no reason to disturb it.

Judgment affirmed.

COMMONWEALTH v. MERRIAM.

31 Mass. 518. (1833)

Indictment for adultery committed by the defendant with Cynthia Blood, in January, 1830.

At the trial in the Common Pleas, before Strong, J., the marriage of the defendant with Betsy Merriam, who was living, was first proved. Johnathan Snow, a witness on the part of the Commonwealth, then testified that in February, 1830, between nine and ten o'clock in the evening, he was passing the defendant's house, and seeing a light, he stepped up to the window and looked in; that he saw the defendant in bed; that Cynthia Blood came in, undressed herself and got into the same bed; and that soon after the defendant blew out the light.

Snow and two other witnesses testified respectively to three in-

stances of improper familiarity between the defendant and Cynthia Blood, one of which was about a fortnight and the others within a year before the adultery proved as above mentioned.

Many witnesses were called to impeach Snow's general character for veracity, and many to support it in that particular.

The evidence of improper familiarities was objected to, as not tending to prove the act of adultery to have been committed on the night when Snow testified he saw Cynthia Blood get into the bed where the defendant lay. But the judge permitted the evidence to go to the jury, upon the ground that instances of improper intimacy or familiarity between Cynthia Blood and the defendant, happening a short time previously to the time when the crime was charged to have been committed, were competent evidence. To this opinion the defendant filed exceptions.

PUTNAM, J. delivered the opinion of the court. Evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to establish the fact in controversy. If the evidence is irrelevant, it should be rejected for two reasons: 1. It would have a tendency to mislead the jury from the true subject of the inquiry; and 2. No man is to be expected to go on trial prepared to prove things which are unconnected with the issue.

The issue upon this indictment was, whether or not the defendant had committed adultery with Cynthia Blood. The government offered the testimony of Jonathan Snow, to prove that the offense was committed with her in February, 1830. The particular day set forth in the indictment was immaterial; the offense might have been proved on that, or any other day prior to the caption of the indictment.

The evidence, from the nature of the offense, must generally be circumstantial. If the facts stated by Snow, are true, there could be no reasonable doubt of the guilt of the defendant.

But Snow's general character for truth was impeached by the defendant and it was supported by the government. And the court admitted evidence of other instances of improper intimacy between Cynthia Blood and the defendant, happening a short time before February, 1830, as having a tendency to corroborate the testimony of Snow, in regard to the intercourse which he testified had taken place between those persons. To the admission of such evidence the defendant objected, and the question is whether it was competent.

It was argued that the defendant was not to be put upon his trial for every act of his life, but for a particular offense. Be it so; if

the evidence which was received, has a natural tendency to corroborate other direct evidence in the case, it would seem to be clearly admissible.

In 9 Petersdorff, 149, note, there are some cases which illustrate this subject. Thus, in prosecutions for uttering counterfeit money, evidence that the defendant had previously uttered other counterfeits, or that he had others in his possession, is admissible. Evidence of this kind has uniformly been received as tending to show the *scienter*. So where several were indicted for a conspiracy to carry on the business of common cheats, it may be proved that *similar* false representations had been made by the prisoner to others who were in business but who were not named in the record.

So upon an issue out of chancery to try a question of illegitimacy, after probable evidence of non-access, evidence may be given that the mother was of bad character. The husband and wife had lived apart, she in London, he in Staffordshire, and the plaintiff was born three years after the separation. Chief Justice Raymond allowed evidence that the mother was of bad fame to rebut the presumption of legitimacy, and the jury found the plaintiff to be illegitimate. Pendrell v. Pendrell, 2 Str. 925.

In the case at bar, after hearing all the evidence concerning the general character of the witness Snow, we think the government might properly introduce the evidence which was objected to. The circumstances thus proved were such as naturally excite in the mind a belief that a woman who would so conduct herself, would be more likely to commit the fact alleged against her, than if her deportment had been modest and discreet.

We all think that the objections made by the counsel for the defendant cannot prevail, and that the defendant must receive sentence in pursuance of the verdict.

COMMONWEALTH v. BRADFORD.

126 Mass. 42. (1878)

COLT, J. The defendant was indicted for wilfully and maliciously burning a building belonging to his two sons. The second count in the indictment charges an intent thereby to defraud the insurer. At the trial evidence was admitted to support the indictment, against the

defendant's objection, tending to prove that the defendant set fire to the same mill a few nights before, and that the fire was then discovered and extinguished by a neighbor.

The evidence was competent on the question of the intent with which the defendant subsequently burned the building, and committed the offense for which he was then tried. It was carefully limited to the single purpose for which it was competent. The unsuccessful attempt to do the same thing, a few days before, was evidence that the burning was wilful and intentional, and not the result of accident or negligence on the part of the defendant. It was sufficiently near to the time of the commission of the offense charged, to justify the inference that the defendant then had a settled purpose in regard to it. It is a rule of criminal law, that evidence tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not admissible. But there was no invasion of this rule in the admission of this evidence. The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is, that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge, and no error in law is here apparent.

Exceptions overruled.

TOLL v. STATE.

40 Fla. 169. (1898)

CARTER, J. Plaintiff in error was convicted in the Criminal Court of Record of Duval county upon an information charging "that one Albert C. Toll, of the county of Duval and State of Florida, on the

1st day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and on divers days and dates between said date and the 9th day of August, A. D. 1897, in the county and state aforesaid, did then and there unlawfully and feloniously have, keep, exercise and maintain a gaming room and gaming house in the city of Jacksonville for the purpose of gaming and gambling, contrary," etc. The information was filed August 24, 1897, and the trial was begun September 2, 1897.

The court refused to strike out certain evidence tending to show that defendant kept a gaming room prior and subsequent to the time laid in the information. It is insisted that the offense of having, keeping and maintaining a gaming room, is a continuing one; that it was so charged in the information, and that evidence of acts tending to prove it occurred prior and subsequent to the time laid in the information was inadmissible. Assuming, but not deciding, that the offense charged is a continuing one, we think the motion to strike was properly refused. There was evidence that defendant kept a gaming room, or a room for that purpose, within the time laid in the indictment. In Brevaldo v. State, 21 Fla. 789, we held that upon an indictment for living in an open state of adultery on a certain day, and on divers other days and times since said date to the date of the finding of the indictment, evidence of acts anterior to such time are (is) admissible in evidence as tending to illustrate or explain similar acts within the period laid in the indictment, or to corroborate testimony of such latter acts, but not to convict of a substantive offense committed anterior to such period. We think the rule stated in the Brevaldo case is applicable to all continuing offenses, and where there is evidence of acts constituting the offense committed within the period laid in the indictment, evidence of acts committed prior or subsequent thereto before the finding of the indictment are admissible when they illustrate, explain or corroborate evidence of acts shown by the evidence to have been committed within the period named.

The judgment of the court below is affirmed.

PROVISION CO. v. CITY OF CHICAGO.

111 Ill. 651. (1884)

MR. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the court:

This was an action on the case by appellant, against appellees, for damages sustained to property in consequence of the construction of a viaduct, in Eighteenth street, over the tracks of the Pittsburgh, Fort Wayne and Chicago Railway Company. Judgment was rendered in the trial court, in favor of appellant, against the city of Chicago alone, for $5,000, and that judgment, having been affirmed on appeal to the Appellate Court for the First District, is brought before us, by the present appeal for review.

It is contended the Superior Court erroneously allowed the witness Pierce to testify as to the price for which a certain lot or piece of property was sold, without testifying as to the value of that lot or of that here affected; and the witness Crawford to testify as to amounts paid by the Western Indiana Railroad Company for lots lying east of the Chicago river. It does not appear that this property had a regular market value, like a commercial article, and mere opinions of its value are shown, by the evidence preserved, to be as variant as the different tastes and fancies of the witnesses. From the very necessities of the case, actual sales of property in the vicinity, and near the time, are competent evidence, as far as they go. On cross-examination, all circumstances can be drawn out, showing that the given sale fails, and how much of being a fair criterion of value. We think there was no error in the admission of this evidence. (St. Louis, Vandalia and Terre Haute Railroad Co. v. Haller, 82 Ill. 208; White v. Hermann, 51 id. 243; Chicago and Western Indiana Railroad Co. v. Maroney, 95 id. 179.) It is much less likely that such evidence can have produced harm in cases like the present, where, as was here done, the jurors themselves visit the property and form their opinions.

Judgment affirmed.

TELEGRAMS AND CONVERSATIONS BY TELEPHONE.[1]

OSKAMP v. GADSDEN.

35 Neb. 7. (1892)

NORVAL, J. Plaintiffs in error brought suit in the court below to recover damages for the alleged breach of contract by the defendant in his refusing to deliver a quantity of hay claimed to have been purchased by them from him. The jury returned a verdict for defendant, upon which judgment was entered.

Error is assigned because the court admitted the testimony of the defendant as to the conversation over the telephone between the witness and Mr. Haines, one of the plaintiffs, as repeated over the wire by Mrs. Cummings, the telephone operator at Fremont. It is contended that the testimony of the witness, of what the operator repeated to him as the conversation progressed as being said by Mr. Haines, is irrelevant and hearsay. The question thus presented is a new one to this court and there are but few decided cases which aid us in our investigation. Upon principle, it seems to us that the testimony is competent and its admission violated no rule of evidence.

It was admissible on the grounds of agency. The operator at Fremont was the agent of defendant in communicating defendant's message to Haines, and she was the latter's agent in transmitting or reporting his answer thereto to defendant. The books on evidence, as well as the adjudicated cases, lay down the rule that the statements of an agent within the line of his authority are admissible in evidence against his principal. Likewise it has been held that when a conversation is carried on between persons of different nationalities through an interpreter, the statement made by the latter at the time the conversation occurred as to what was then said by the parties is competent evidence and may be proven by calling persons who were present and heard it. This is too well settled to require the citation of authorities. There are certainly stronger reasons for holding the statement made by the operator and testified to by defendant is admissible than in the case of an interpreter. Both Haines and defendant heard and understood the operator at Fremont and knew what she was saying, or at least could have done so. Each knew whether his message was being correctly repeated to the other by the operator. Not so where persons converse through an interpreter.

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[1] Hughes' Pocket Digest of Evidence, pp. 424, 428.

If the testimony objected to was incompetent and hearsay, then the testimony of Haines relating to the same conversation should, for the same reason, have been excluded. He did not hear what defendant said, but testified to what the operator reported as having been said. The operator at Fremont was not the agent of the defendant alone, but she was plaintiff's agent in repeating their answer to defendant's message.

That conversations held through the medium of the telephone are admissible as evidence in proper cases, cannot be doubted. Such have been the holdings of the courts in cases where the question has been before them. In a criminal case, People v. Ward, 3 N. Y. Crim. Rep. 483, it was held that where a witness testifies that he conversed with a particular person over the telephone and recognized his voice, it was competent for him to state the communication which he made.

In Wolfe v. M. P. R. Co., 97 Mo. 473, it was ruled that if the voice was not identified or recognized, but the conversation is held through a telephone kept in a business house or office, it is admissible the effect or weight of such evidence, when admitted, to be determined by the jury. (See Globe Printing Co. v. Stahl, 23 Mo. App. 451.)

Our conclusion is that the court did not err in admitting the testimony of the defendant.

Affirmed.

NICKERSON v. SPINDELL.

164 Mass. 25. (1895)

KNOWLTON, J. There was evidence to show that the plaintiff performed the services and incurred the expenses set out in his declaration, in superintending the building of a steamer for the defendants and others who were the owners of her, and that he did this at the request of the defendant Spindell, who was the managing agent of the owners.

When the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to

show mistake in the transmission of it. Whether we should go further and hold that the telegraph company is so far the agent of the sender as to bind him by their errors in sending it, it is unnecessary in this case to decide. There is much authority in support of this last proposition, although the contrary has been held in England. There was no error in the admission of the testimony. See Durkee v. Vermont Central Railroad, 29 Vt. 127; Saveland v. Green, 40 Wis. 431; New York & Washington Printing Telegraph Co. v. Dryburg, 35 Penn. St. 298; Wilson v. Minneapolis & Northwestern Railroad, 31 Minn. 481; Anheuser-Busch Brewing Association v. Hutmacher, 127 Ill. 652, 658; Western Union Telegraph Co. v. Shotter, 71 Ga. 760; Howley v. Whipple, 48 N. H. 487; State v. Hopkins, 50 Vt. 316; Smith v. Easton, 54 Md. 138; Henkel v. Pape, L. R. 6 Ex. 7.

Exceptions overruled.

WILSON v. COLEMAN & RAY.

81 Ga. 297. (1888)

BLANDFORD, Justice. Coleman & Ray sued Wilson for failing to deliver to them three car-loads of Texas rust-proof oats, which, they alleged, they had purchased from Wilson, and which he had agreed to deliver to them at a specified time. A recovery was had by the plaintiffs, and the defendant moved for a new trial, which was refused, and he excepted.

Another ground of exception is, that the court allowed Coleman to testify as to the demand made by his clerk, through the telephone, on Wilson for the oats, and Wilson's reply as repeated to him by the clerk. This evidence was merely hearsay, and the court erred in admitting it; but there is plenty of evidence in the record to sustain the verdict, and we will not send the case back for an error of this kind, it being immaterial in the view we take of the case. We think the court was right in refusing a new trial; and the judgment is

Affirmed.

SMITH AND WHITING v. EASTON.

54 Md. 138. (1880)

BRENT, J., delivered the opinion of the court.

The question raised is the admissibility in evidence of the dispatch purporting to come from New York, and offered for the purpose of binding the appellee as promisor to endorsee.

The appellants proved under a commission to New York City, on April 5th, 1878, that all the messages sent from, and receipts for messages delivered from the office in that city, on February 16th, 1875, had been destroyed.

The message, if any, sent by James T. Easton, to that office, to be transmitted to Chesapeake City, was the original (Scott & Jarnagin, Law of Tel., sec. 357, and authorities there cited,) and not the message which was received over the wires at Chesapeake City. The latter must be considered as a copy (Ibid. sec. 361,) and carries with it none of the qualities of primary evidence. Ordinarily the usual course is to show the delivery of the original message of the party, sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination. But even where the original is produced its authenticity must be established. And this either by proof of the hand-writing, or by other proof establishing its genuineness. The destruction of all the messages sent from the office, on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents.

In Howley v. Whipple, and others, 48 N. H. 487, a message was sent by telegraph to Montreal, and an answer was very soon received, purporting to come from the party to whom the message was addressed, and to be sent from Montreal. The court refused to admit it, without proof that it was in fact sent by the proper party. It was contended in this case, that the rule, which permits a letter to be admitted, as evidence against a party, when there is no proof of the hand-writing, except the fact that, in due course, it had been received in reply to a letter which had been addressed to the same party, should be applied to telegraphic dispatches. While it was thought it might apply to a dispatch in answer to a communication by letter, it was held to be inapplicable to a dispatch received in reply to a communica-

tion sent by telegraph. And this seems to be now the recognized law where both the message sent and the answer are by telegraph.

In the case of The United States v. Babcock, 3 Dillon, 576, the court refused to allow a telegraphic dispatch to be offered in evidence without proof of the hand-writing of the defendant, or that it was authorized, or sent by him or by his direction. And this we take to be the unquestionable rule.

Judgment affirmed.

SHAWYER v. CHAMBERLAIN.

113 Iowa 742. (1900)

The defendant, by written contract, purchased a stock of drugs and certain fixtures of plaintiff December 30, 1898, and refused to carry out its terms, and this is an action for the resulting damages. Verdict and judgment for the plaintiff, and the defendant appeals. Affirmed.

LADD, J. The defendant insists that the testimony of plaintiff to a conversation with him through the telephone ought to have been excluded, for that it is of too uncertain and easily manufactured a character to be competent. These defects, if they exist, would not justify rejecting such evidence, but merely affect the weight it should receive. This method of communication, of recent origin, is one of the incidents of contemporary history, of which the courts take judicial notice. It greatly facilitates business transactions, and there is no better reason for rejecting proof of a conversation over a telephone line than of one had without its use. Identity may be established by means of the hearing or other circumstances quite as readily, though possibly not as certainly, as by sight. Wolfe v. Railway Co., 97 Mo. 473 (11 S. W. Rep. 49, 10 Am. St. Rep. 331); Oskamp v. Gadsen, 35 Neb. 7 (52 N. W. Rep. 718, 17 L. R. A. 440); Sullivan v. Kuydendall, 82 Ky. 483. See German Sav. Bank of Davenport v. Citizens' Nat. Bank, 101 Iowa, 530; Davis v. Walter, 70 Iowa 465.

BANNING v. BANNING.

80 Calf. 271. (1889)

CANCLIFF, C. Action for partition of land. The complaint is in the most general form, alleging that the parties own the land as tenants in common, and specifying the undivided portion to which each party is entitled. The answer denies that either of the plaintiffs has an estate in the land, and alleges that the defendant is the sole and exclusive owner, and in the exclusive possession thereof.

The appeal rests upon judgment roll alone, including the additional findings, and appellant's counsel contend that the findings do not support the judgment, for the reason that they do not show that defendant executed the deeds to the plaintiffs by which plaintiffs claim title. The special and only ground of objection to the sufficiency of the execution of those deeds is, that at the time the deeds were acknowledged the defendant was a married woman, and was not visibly, and therefore not personally, present before the notary at the time he took her acknowledgment through a telephone, she then being three miles distant from him, as appears by the additional findings.

The answer to this objection is, that in the absence of fraud, duress, accident, and mistake, the certificate of the notary in due form of law is conclusive of the material facts therein stated. The facts stated in the additional findings were not admissible as evidence to dispute the official certificate of the notary; and if admitted should have been disregarded, as they evidently were, by the trial court.

It is admitted that the certificate of the notary is in due form: and it is not alleged or pretended by the defendant that she did not volunarily sign and deliver the deeds; nor that she did not voluntarily, and without the hearing of her husband, acknowledge the execution of them through the telephone, after being informed by the notary of their contents; nor that any deception or fraud was practiced to induce her to execute the deeds; nor even, that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone.

These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress or mistake.

BELCHER, C. C., and HAYNE, C., concurred.

LORD ELECTRIC CO. v. MORRILL.

178 Mass. 304. (1901)

Contract on an account annexed against the lessee for twenty-five years of the Jewelers Building, so called, on the corner of Washington and Bromfield Streets in Boston, to recover for putting in additional electric lights and wires not included in a written contract between the plaintiff and the trustees of that building. Writ dated July 19, 1899.

At the trial in the Superior Court, before Sheldon, J., one Driscoll, a witness for the plaintiff, testified that he was the plaintiff's bookkeeper, and that he remembered having a conversation over the telephone with the defendant. He was then asked by the plaintiff, what the conversation was. The defendant objected to the evidence, whereupon the judge asked the witness "Do you know it was Mr. Morrill?" and the witness answered "Well, I was quite familiar with his voice and I recognized it as such." The judge then admitted the conversation and the defendant excepted.

MORTON, J. This is an action to recover of the defendant his share of the expense of certain electrical work done by the plaintiff in a building called the Jewelers Building on the corner of Washington and Bromfield Streets in Boston. There was a verdict for the plaintiff, and the case is here on the defendant's exceptions to the refusal of the court to rule that on the pleadings and evidence the plaintiff was not entitled to recover, to the admission of a conversation over the telephone with the defendant, and to the judge's charge.

As to the conversation over the telephone, the witness testified that he recognized the defendant's voice. This was sufficient evidence of identity to justify the court in admitting the evidence. The conversation does not seem to have been material, but we see no way in which the defendant could have been harmed by it.

SAVELAND v. GREEN.

40 Wis. 431. (1876)

LYON, J. The telegram received by the plaintiff at Milwaukee from Bohne was read in evidence, against the objection of the de-

fendant; and the message delivered in the office at Buffalo was not produced, or its absence accounted for.

The learned counsel for the defendant insist that the latter is the original, and should have been produced; and that the message received by the plaintiff was but secondary evidence, at most, and could not properly be received until the loss of the original had been proved.

In a late treatise on the subject (Scott & Jarnagin on the Law of Telegraphs), it is said that "telegraph messages are instruments of evidence for various purposes, and are governed by the same general rules which are applied to other writings." (Sec. 340.) Also, that "the original message, whatever it may be, must be produced, it being the best evidence; and in cases of its loss, or inability to produce it from other cause, the next best evidence the nature of the case will admit of, must be furnished. If there is a copy of the message existing, it should be produced; if not, the contents of the message should be shown by parol testimony." (Sec. 341.) We believe the above extracts contain a correct statement of the law, and so hold.

It only remains to determine which was the original message, that delivered to the telegraph company by Bohne at Buffalo, or that received by the plaintiff from the telegraph office in Milwaukee.

Discussing a similar question in Durkee v. Vt. C. R. R. Co., 29 Vt. 127, Redfield, Ch. J., stated the law as follows: "In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for its transmission across the line, or, in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case, inquiry should first be made for the very dispatch delivered. In default of that, its contents may be shown by the next best proof." (p. 140.) To the same effect are Trevor v. Wood, 36 N. Y. 307, and Dunning v. Roberts, 35 Barb. 463. In Howley v. Whipple, 48 N. H. 487, it was sought to prove that a person was in Montreal on a given day, by showing that a telegram, purporting to have been sent by him from that place on that day, was received at a town in New Hampshire. It was held that the message received did not prove the fact that the supposed sender thereof was then in Montreal. The decision was doubtless correct. But the court in that case recognized the correctness of the rule laid down in the cases above cited.

After a careful consideration of the question, and after full examination of all the adjudications we can find bearing upon it, we have

reached the conclusion that the law applicable to this case is correctly stated by Judge Redfield in Durke v. Vt. C. R. R. Co., *supra*.

The same principle is also laid down in Scott & Jarnagin on Telegraphs, as follows: "Sec. 345. In all cases where the company can be considered as the agent of the sender of the message, in controversies arising out of the communication by telegraph between the sender and the person to whom the message is addressed, the message received by such person must be regarded as the original. If it differs from the message delivered for transmission, by which the sender has suffered damage, he must look to his agent, the telegraph company, for indemnity. In such controversies between the sender and receiver, the message received is the best evidence."

By the Court.

Judgment affirmed.

MILES v. ANDREWS.

153 Ill. 262. (1894)

MR. JUSTICE BAKER delivered the opinion of the court:

This was an action of assumpsit, by appellants, against appellees, upon three promissory notes. The declaration contained three special counts, each describing one of the notes in suit, and also the common counts. The defendants filed two special pleas: First, that the notes were given without any good or valuable consideration; and second, that the sole and only consideration upon which they were executed was for money won by plaintiffs from defendant Robert B. Andrews in a certain speculation on the market price of grain, and defendant Wells Andrews signed the notes as surety. On the trial the jury found for the defendants, and judgment was rendered on the verdict. Appellants appealed to the Appellate Court, where that judgment was affirmed. A reversal is urged here upon the ground that the trial court admitted improper evidence, and gave improper instructions to the jury on behalf of the defendants.

Wells Andrews also testified: "Prior to signing these notes my son had asked me to sign them. My son and I then went to the telephone office together, and then Robert went to the telephone and called for P. B. and C. C. Miles, and they rang, and he says, 'Philo, is that you?' Did not hear the answer. Then Robert said, 'I have been down to

see uncle Johnny to go on the notes, and he said he had got sick and tired of gambling in these options, and would not go on the note, but father would,' and then turned around and said, 'Philo says it is all right.'" The witness did not hear the answers, and did not of his own knowledge know that Robert was at the time talking to Philo, if to any one. Counsel for appellants insist that this testimony was incompetent. Robert Andrews testified that he talked to Philo B. Miles at the time spoken of by his father. The conversation being thus shown to have been between two of the parties to the suit, and upon the subject-matter of the litigation, was, we think, competent, though perhaps entitled to little weight.

Judgment affirmed.

SULLIVAN, &c., v. KUYKENDALL.

82 Ky. 483. (1885)

JUDGE HOLT delivered the opinion of the court.

By the terms of a verbal contract for the sale of personal property, the appellants, Sullivan & Co., were to estimate and receive it within ten days after notice from the appellee, Kuykendall, that it was ready.

In view of another trial of the case it is proper that we should pass upon what seems to us to be a new question as to the competency of certain testimony; at least we have been unable to find any direct authority upon it.

The appellee, upon going to the place, on February 9, 1880, where the property was to be received, did not find the appellants, or any one representing them.

He thereupon went to a telephone office at Morgantown, Kentucky, for the purpose of communicating with the appellants at Bowling Green, Kentucky; and not being accustomed to the use of the instrument he got the operator to talk for him.

He first directed him to call for the appellant, Sullivan, and he did so, the Bowling Green operator reporting back that he would send for him to come to the office. Presently the Morgantown operator told the appellee that Sullivan was at Bowling Green office and desired to know what was wanted, and thereupon a conversation took place, Sullivan using the instrument himself while the Morgantown

operator talked for the appellee, and told him what Sullivan said as it came over the wire.

The latter testifies that on that day he had a conversation over the telephone with some one at Morgantown, and upon the same subject to which the appellee says the conversation related; but they differ widely as to what was said. The Morgantown operator, being introduced as a witness, testifies that upon the day named he had a conversation upon that subject with some one at Bowling Green, whom the operator there told him was Sullivan; but that he does not recollect what was said. Under this state of case the court below permitted the appellee to prove, by himself and two other persons who were present at the time, what the Morgantown operator reported to appellee, while the conversation was going on over the wire, as being said by Sullivan.

It is certain that the latter did talk over the wire, because he says so. The appellee did not pay the telephone charge, and it does not appear who did, save the Bowling Green operator reported to the Morgantown one that Sullivan would do so; and the latter is silent upon this point.

It would, beyond question, have been competent to prove, by the Morgantown operator, what Sullivan said to him; but whether his report to the appellee of what Sullivan was saying, made as the conversation progressed, is competent or falls within the domain of incompetent hearsay testimony, is a question of importance in view of the astonishing growth of the business to which it relates, and one not free from difficulty.

In the case of a telegram, the original must usually be produced in evidence, or its loss shown, before its contents can be proven or the copy delivered by the operator to the party receiving the message used, unless it be where the copy becomes primary testimony by the telegraph company being the agent of the sender.

In the use of the telephone, however, the parties talk with each other as if face to face; and, save where a mere message is sent, there is no written evidence of what has passed. By inventive means they are brought together for the transaction of business.

It is a well settled rule that where one, through an interpreter, makes statements to another, the interpreter's statement made at the time of what was so said, is competent evidence against the party.

The interpreter need not be called to prove it, but the interpreter's statement, made at the time, may be proven by third persons who were present and heard it. (Camerlin v. Palmer Co., 10 Allen 539;

Schearer v. Harber, 36 Ind. 536; 1 Greenleaf's Ev., section 183; 1 Phillips' Ev. 519, side-page.)

The reason of this rule is that the interpreter is the agent of both parties, and acting at the time within the scope of his authority, and we have been unable to draw any satisfactory distinction between this case and the one under consideration.

Subject to various qualifications, the old rule, that a party must produce the best evidence within his power to prove a fact, should govern. But as business expands by the aid of new inventions, wider scope must be given to the rules of evidence. There is no need, however, of any departure or innovation in this case, because it is a well settled rule of evidence that the statements of an agent, when acting within the scope of his agency, are competent against his principal.

When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and, in such a case, certainly the statements of the operator are competent, being the declarations of the agent, made during the progress of the transaction.

If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence.

Judgment reversed.

JOINT CRIME AND ONE ACQUITTED.

STATE v. RINEHART.

106 N. C. 787. (1890).

Indictment for fornication and adultery. Verdict of guilty. Judgment and appeal.

DAVIS, J. After stating the facts: When two persons are tried jointly for the commission of an offense that requires the joint act of the two to commit, and one of them is acquitted, there cannot be a verdict of guilty as to the other.

The defendants are charged with fornication and adultery, and, as the offense charged is a joint one, if one of the parties in the joint trial be acquitted, or if one of them has been previously acquitted on a separate trial, it operates as an acquittal of the other, and there can be no judgment as to either. State v. Mainor, 6 Ired. 340; State v. Parham, 5 Jones, 416.

This has been the ruling in North Carolina, though the doctrine held by us has been fully reviewed in Texas where it is repudiated, and it is held that the acquittal of one does not *per se* operate as an acquittal of the other. Alonzo v. State, 15 Tex. Appl. 378. The same has been held by the Supreme Court of Tenn. State v. Caldwell, 8 Baxter 576.

It may well be doubted whether, when one of the parties has confessed and admitted guilt, or there is competent evidence to convict as to one and not the other, it would not be more in accord with reason to permit the jury to render a verdict of guilty as to the one admitted or proved to be guilty and return a verdict of not guilty, because not proved as to the other, than to require them to say not guilty as to both, contrary to the admitted or clearly proven facts. Under such a rule no innocent person would ever be punished, and no injustice could be done, unless it be an injustice to convict and punish the guilty. While it is well settled that the admissions or confessions of one defendant are competent as evidence against the party making the admissions, or confessions, it is equally well settled, both by judicial decisions and by statute (The Code, sec. 1041), that such admissions, or confessions, "shall not be received in evidence against the other."

Affirmed.

STATE v. CALDWELL.

67 Tenn. 576. (1876)

FREEMAN, J. Defendant with a woman named Green, were jointly indicted for open and notorious lewdness. The parties severed for trial, and the woman was acquitted. A plea was filed in bar to the further prosecution on the part of defendant on the ground that the acquittal of the woman operated as equivalent to an acquittal of the man, as the offense could only be committed by two persons. The plea was demurred to, but the demurrer overruled. The attorney-general declining to take issue on the plea, the defendant was discharged and the State appealed.

We think the court erred in refusing to sustain the demurrer. The State might fail to be able to make proof of the offense in the trial of one party from many causes, yet might be able to make proof on the trial of the other. We so held at Nashville some time since, and approve the holding. The acquittal of one could not show the other was not guilty.

Reverse the judgment and remand the case to be further proceeded with.

ALONZO v. STATE.

15 Tex. Ap. 378. (1884)

WILLSON, J. J. Defendant and one Lydia Huberick were jointly charged by information with living together in adultery, defendant being unmarried, and said Lydia being a married woman. Lydia Huberick severed from her co-defendant upon the trial and was tried first, the trial resulting in her acquittal. When the defendant's case was subsequently called for trial he filed a special plea of former acquittal, in substance setting forth that the information charged a joint offense against Lydia and himself; that they were charged with adultery with each other; that a severance was granted; that Lydia had been tried and acquitted for said offense; and that her acquittal in law operated as an acquittal also of himself of the said

charge. On motion of the county attorney, this plea was stricken out, and this action of the court is assigned as error.

In North Carolina it has been held that "after the acquittal of one of the defendants (in a joint charge of adultery), there could be no judgment against the other. The crime charged on these persons could not be committed but by both of them; and upon a verdict that one of them was not guilty, it appears conclusively that the other could not be. It is exactly like the case of riots, conspiracies and principal and accessory which we find in the books. The farthest the courts have gone is to allow one of the parties to be tried by himself and convicted and then judgment is given against that party, because as to him the guilt of the other party is found, as well as his own. But when the one has been previously tried and acquitted or when both are tried together and the verdict is for one, the other cannot be found guilty, for he cannot be guilty, since a joint act is indispensable to the crime in either, and the record affirms that there was no such joint act." (State v. Mainor and Wilkes, 6 Iredell, N. C. 340; State v. Parham, 5 Jones, N. C. 416.)

We cannot give our assent to the doctrine of the above cited cases, nor to the reasoning of these decisions upon which the same are founded. We think the reasoning is based upon false premises and is fallacious. While it is true that, to constitute adultery, there must be a joint physical act, it is certainly not true that there must be a joint criminal intent. The bodies must concur in the act, but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty the other innocent, and yet the joint physical act necessary to constitute adultery may be complete. Thus, if one of the parties was, at the time of committing the physical act, insane, certainly such party has committed no crime; but it certainly cannot be contended that the other party, who was sane, has committed no crime. So, if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime. (Penal Code, Art. 15; Watson v. The State, 13 Texas Ct. App. 76.) But, suppose the other party was not mistaken as to such fact, but, on the contrary, well knew the true fact which rendered the connection illicit, would this party be regarded as guilty of no offense because the mistaken party was innocent?

If the North Carolina rule is correct, it must apply also to fornication, bigamy and incest. Now, suppose a father and his daughter are indicted for incestuous intercourse with each other. Upon the trial of the daughter it is conclusively proved that at the time of committing the physical act she was an idiot, or that she was wholly ignorant of the relationship existing between herself and her father, without any fault of hers; of course in either of these cases she must be acquitted. Would it not be monstrous to hold that because of her innocence—her acquittal—the beastly father must go unpunished for his unnatural crime? Such cannot be the law, and such, we believe, is not the law as declared by the weight of authority.

In Missouri, it has been held, in a case of incest where one party had knowledge of the relationship and the other was ignorant of it, that the former may be convicted and the latter acquitted. (State v. Elliss, 74 Mo. 385.)

We therefore hold that the court did not err in sustaining the motion of the county attorney to strike out the special plea of former acquittal filed by the defendant. The acquittal of his co-defendant could in no manner affect the question of his guilt or innocence, and the case must be considered without reference to such former acquittal of his co-defendant.

Reversed and remanded on another ground.

Note. Jurors are bound by oath to render a verdict according to the evidence. Hence, in the case of a joint crime requiring two persons to commit, if the evidence is sufficient to convict one and insufficient to convict the other a verdict of guilty as to the former and not guilty as to the latter is perfectly consistent.

PART IV.

REAL EVIDENCE.[1]

CONTINENTAL CASUALTY CO. v. WYNNE.

36 Okla. 325. (1912)

Action by Frank E. Wynne against the Continental Casualty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

BREWER, C. This is a suit on an accident insurance policy, and was brought by Frank E. Wynne, as plaintiff, against the Continental Casualty Company, a corporation, as defendant, in the District Court of Cleveland county, September 19, 1908. We shall refer to the parties as they were known in the trial court.

The next objection (*i. e.*, that it was error to permit plaintiff to show the jury the parts of his person—that is, his shoulder and collar bone—alleged to have been injured and broken) is likewise without merit. We think ordinarily where the question of an injury, or its extent or permanency, is in issue that this would be proper. City of Kingfisher v. Sparel Altizer, 13 Okla. 121, 74 Pac. 107; Wigmore on Ev. vol. 3, sec. 222, and note; Jones on Ev. (2nd ed.) 396-398. For a discussion of the principle involved, see C. R. I. & P. Ry. Co. v. Hill, Post, 129 Pac. 13. But it was peculiarly proper in this case because of a provision of the policy sued on. In part 3 numerous things are mentioned, the happening of any one of which, it is stipulated, shall reduce the amount payable to one-tenth of the amount which would otherwise be payable under the policy. One of these things causing such reduction is: "Where the accidental injury makes no visible contusion or wound on the exterior of the body of insured." Therefore, regardless of whether this testimony would have been otherwise competent, it certainly was both competent and material in this case to show that the injury had left its visible mark on the body of the insured; and we can think of no proof so satisfactory in showing the same as the exposure of the part alleged to have been seriously wounded and injured.

Affirmed.

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[1] Hughes on Evidence, p. 165.

GRAND LODGE B. of R. T. v. RANDOLPH.

186 Ill. 89. (1900)

CARTER, J. The appellee brought suit in assumpsit in the Circuit Court of St. Clair County against the appellant, a fraternal beneficial society of this State, on a certificate of membership, to recover the amount stipulated in the constitution of the society for a total permanent disability.

There was much controversy on the trial over the question whether or not appellee was totally and permanently disabled, but that question of fact has been conclusively settled in his favor.

It is contended, however, that the trial court erred in its rulings upon the admission and exclusion of evidence, and we have carefully examined the evidence and the questions thus raised but do not find that any error was committed. For example, it is contended that the court erred in refusing to allow the witness Holmes to exhibit his injured ankle to the jury. The purport of the testimony of the witness was that his ankle had been crushed and injured as seriously as the plaintiff's leg had been, and that it had so far healed that he was still able to perform his duties in the train service of the railroad company. Certain medical witnesses for the plaintiff had testified, in effect, that a fractured leg never gets well, and that a person who had suffered such a fracture would be disabled from performing train service upon railroads. The defendant sought to dispute such testimony by the personal experience of Holmes and by the exhibition of his leg to the jury. The court permitted a liberal examination of this witness, and allowed the defendant to elicit from him all proper testimony tending not only to contradict the testimony given on behalf of the plaintiff, but tending to prove that notwithstanding plaintiff's injury he was not totally and permanently disabled from engaging in railroad train service, as alleged. But it is obvious that the point in issue was the extent of the plaintiff's and not of the witness' injuries, and that to have permitted the close scrutiny requested, into the nature and extent of the injury to the witness' ankle, would have raised a collateral issue and diverted the minds of the jury from the issues submitted to them.

Judgment affirmed.

UNION PACIFIC RAILWAY COMPANY v. BOTSFORD.

141 U. S. 250. (1890)

The original action was by Clara L. Botsford against the Union Pacific Railway Company, for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial.

Three days before the trial (as appeared by the defendant's bill of exceptions), "the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner; the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case; and that without such examination the defendant would be without any witnesses as to her condition. The court overruled said motion, and refused to make said order, and upon the sole ground that this court had no legal right or power to make and enforce such order."

To this ruling and action of the court the defendant duly excepted, and after a trial at which the plaintiff and other witnesses testified in her behalf and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

MR. JUSTICE GRAY. The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make or enforce such an order.

No right is more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference or otherwise, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said

to be a right of complete immunity; to be let alone." Cooley on Torts 29.

The inviolability of the person is as much invaded by the compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission. was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country.

In former times, the English courts of common law might if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy, or the identity of a party; or, on an appeal of maihem, the issue of maihem or no maihem; and in an action of trespass for maihem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, "it is not thought necessary to summon a jury to decide it," because "the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragible proof," and, therefore, "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Blackstone's Com. 331-333.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Com. 456; Bac. Ab. Bastard, A. In cases of that class, the writ has been issued in England in quite recent times. In re Blakemore, 14 Law Journal (N. S.) Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered,

in any part of the United States, as suited to the habits and condition of the people.

So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history.

Within the last fifteen years, indeed, as appears by the cases cited in the brief of the plaintiff in error, a practice to grant such orders has prevailed in the courts of several of the Western and Southern States, following the lead of the Supreme Court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law.

Judgment affirmed.

McQUIGAN v. D. L. & W. R. R. CO.

129 N. Y. 50. (1891)

Appeal from an order of the General Term of the Supreme Court in the fourth judicial department, made April 28, 1891, which affirmed an order of the Special Term denying a motion by defendant for an order directing the plaintiff in an action for personal injuries, to submit to a physical examination by surgeons to be appointed by the court, and for the appointment of a receiver, under whose direction such examination should take place.

ANDREWS, J. The sole question presented by this record is whether the Supreme Court has power in advance of the trial of an action for a personal and physical injury to compel the plaintiff on an application made in behalf of the defendant to submit to a surgical examination of his person by surgeons appointed by the court with a view of enabling them to testify on the trial as to the existence and extent of the alleged injury. The question is not new in the courts, although so far as we know it was first presented in 1868 before a judge of the New York Superior Court at Special Term in the case of Walsh v. Sayre (52 How. Pr. 334), who affirmed the existence of the power. The contrary was held by the General Term of the third department in Roberts v. Ogdensburgh & Lake Champlain Rail-

road Co. (29 Hun, 154). In 1877 the Supreme Court of Iowa in the case of Schroeder v. C. R. I. & P. R. Co. (47 Iowa 375), sustained the doctrine that the court had an inherent right to grant a compulsory order that the plaintiff submit to such examination, and this decision has been followed by the courts of several of the western and southern states, and in others the power has been denied. The same question was considered in the United States Supreme Court in the recent case of Union Pacific Railroad Co. v. Botsford (141 U. S. 250), and the court (two judges dissenting) decided adversely to the claim that the court had power to compel such examination. The opinions of the several courts which have passed upon the question present very fully the considerations bearing upon it. We concur in the view taken by the Supreme Court of this state, and the Supreme Court of the United States, and we can add very little to the full discussion to be found in the opinions of those courts.

The order should be affirmed.

All concur.

Order affirmed.

HAYNES v. TRENTON.

123 Mo. 326. (1894)

BARCLAY, J. This is an action to recover compensation for personal injuries sustained by plaintiff. It is based on defendant's alleged negligence in omitting reasonable care to keep a sidewalk in proper condition for public use.

MACFARLAND, J. It appears from the record, that during the trial, plaintiff was permitted to exhibit to the jury his injured leg. This was done while plaintiff was under examination as a witness in his own behalf. The evidence tended to prove that plaintiff had previously sustained an injury to the same leg at or near the same place. In a former trial, experts had been permitted to examine the leg and testify as to its condition and the probable permanency of the injuries.

After plaintiff had shown his leg to the jury on this trial, and evidence had been offered tending to prove that the injuries were greater than they appeared on the former trial to have been, defendant, as a part of the cross-examination of plaintiff, asked that physicians, who had previously examined the leg, might be permitted

to make a further examination and give their opinion as to its condition as compared with that when previously examined. This request the court refused, and in doing so we think it committed reversible error.

The leg, when shown to the jury, became evidence in the case which may have carried with it great weight, particularly in the matter of the damage sustained. This evidence thus put into the case was open to attack by the opposite party in any manner which may have tended to reduce its probative force. When, for example, a piece of machinery or material, the character or quality of which is in issue, is exhibited to the jury, it is always competent for the opposite party to have experts examine it and give the jury their opinion of the quality of the material and the sufficiency of the machinery. When admitted in evidence, and its damaging effect has been accomplished, it can not be withdrawn until the party affected by it has had opportunity to apply every test for the purpose of overcoming its force and effect.

No reason can be urged why a different rule should be applied when an injured limb is the subject of inquiry. Defendant had the undoubted right in this case, at any time after the injuries had been shown to the jury, to have physicians examine the injured leg and testify, as experts, to its character and probable permanency.

The question was not as to the right of defendant to have an examination of the injuries made, but as to the right to test the effect and reduce the weight of evidence introduced by plaintiff.

BLACK, C. J., and BRACE, J. concur.

CITY OF SOUTH BEND v. TURNER.

156 Ind. 418. (1900)

HADLEY, J. Suit by appellee to recover damages for personal injuries.

The first ground urged for a new trial is the refusal of the court, upon appellants' motion, to order a physical examination of the plaintiff.

The overruling of this motion presents a question of some difficulty, and upon which the courts of the country are not entirely agreed. It is one, too, that has but recently engaged the attention of the courts

of last resort. The fundamental principle, however, is an ancient doctrine of the common law, limited, it is true, to a few classes of cases, among them mayhem and divorce cases, wherein impotency was charged; but as the sources of evidence have been extended to parties and in many other ways, its application has been expanded to meet new conditions. The doctrine rests upon the principle that justice is the object of judicial investigation, and that courts charged with its administration, as a necessary means of attaining that end, have inherent power to require the production of the most infallible evidence. That its application to personal injury cases is a modern practice does not disprove its common law origin.

Beginning with the case of Loyd v. Hannibal, etc., R. Co., 53 Mo. 509, decided in 1873, there have followed many adjudications upon the power of the trial court to order a physical examination of the plaintiff in suits for personal injuries upon request of the defendant. In this first case, the power, upon slight consideration, was denied. In 1877, in the well considered case of Schroeder v. Chicago, etc., R. Co., 47 Iowa 375, the power was affirmed. Following this lead, the states of Alabama, Arkansas, Georgia, Kansas, Kentucky, Michigan, Missouri, Minnesota, Nebraska, Pennsylvania, Ohio, Texas, and Wisconsin have reasserted the rule as announced in the Iowa case.

These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence. In *quasi* recognition of this power it is the law of this State, and other states so far as we have observed, that the court may permit the plaintiff in both civil and criminal cases to exhibit to the jury such weapons, implements, clothing, and wounds upon his person, or upon the person of the prosecuting witness, as are asserted to be the means, or effects, of the violence complained of.

The cases above cited as affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an

order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding.

For error of the court in overruling the motion, the appeal must be sustained. Judgment reversed, with instructions to grant appellant's motion for a new trial.

THE A. T. & S. F. R. R. CO. v. THUL.

29 Kan. 466. (1883)

VALENTINE, J. This action was brought by John Thul for damages.

Upon the trial, the plaintiff introduced his evidence, and rested. The evidence tended to prove the plaintiff's entire case. It showed the manner in which he was injured, and the nature, character and extent of the injury. And the evidence, as well as the plaintiff's petition, showed that it was the injury to the plaintiff's eyes of which he principally complained. The plaintiff himself was a witness in the case, and testified in his own behalf. After the plaintiff rested his case, the defendant requested the court to have the plaintiff submit himself to the examinaion of Dr. A. D. Williams, who was then present, from St. Louis, and whom it was stated the defendant would call as a witness. This request was made in the following words, to wit: "If the court please, we ask that the plaintiff in this case, John Thul, submit himself to the examination of Dr. Williams, a witness

we shall call for the defense, now here from St. Louis." This request was objected to by the plaintiff, in the following words, to wit: "We object, under the ruling of the 53rd Missouri Report." The court below sustained the objection, in the following words, to wit: "The objection is sustained." And to this ruling of the court the defendant excepted. Counsel for the defendant then addressed the court as follows:

"What we want to do, if the court please, is, to have this plaintiff submit himself to the examination of Drs. Jones, Redden, Stormont, and Williams of St. Louis, whom we propose to produce as witnesses on the stand; and we ask permission and order of the court that so many doctors as we may desire may have an opportunity to make an examination of the plaintiff's eyes in the presence of this court and jury."

To this the counsel for plaintiff responded as follows: "We object." And the court then answered as follows: "The objection is sustained." To which ruling of the court the defendant again excepted.

That portion of the 53rd Missouri Report upon which the plaintiff made the objection, reads as follows:

"The proposal of the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides: any opinion of physicians or surgeons at that time would have only been cumulative evidence at best, and the court had no power to enforce such an order." Loyd v. H. & St. J. Railroad Co., 53 Mo. 509, 515, 516.)

The objection, we would think from the facts of the present case and from this citation, was based upon the grounds that such a practice is unknown to the law, and that the court had no power to enforce the order for such an examination. We think it could not have been because there was already abundant evidence upon the subject in the case, for at the time the request was made no physician or surgeon or medical expert of any kind had testified in the case; and indeed at the close of the evidence no physician or surgeon or medical expert had testified in the case except Dr. Williams, and he could not testify intelligently upon the subject, for the reason that he had made no personal examination of the plaintiff.

In criminal cases a personal inspection of the defendant is generally not allowable, for an order of the court compelling the defendant to submit to a personal examination would virtually be com-

pelling the defendant to "be a witness against himself" which is not allowable under sec. 10 of the Bill of Rights, of our constitution. However, where the examination is only for identification it is sometimes allowable.

It was shown in the present case by the testimony of Dr. Williams that the nature, the extent and the permanency of the injury to the plaintiff's eyes could not be determined with any reasonable degree of accuracy except by a careful examination, made by some oculist or person who had made diseases and affections of the eyes a special study; and we would naturally suppose that such would be the case, independent of the testimony of Dr. Williams. Hence it would seem that in a case like the present the evidence of some such expert who had made such an examination would be an almost indispensable necessity; but such evidence in many cases could not be obtained unless the plaintiff were first compelled by an order of the court to submit himself to a personal examination by some such expert. Now is such evidence to be lost and justice possibly defeated, or may the court order that such an examination may be had? We favor the proposition contained in the latter portion of this alternative. We would think that the defendant in a case like the present would be entitled as a matter of right, upon a proper application and upon a proper showing, to have an order made by the court compelling the plaintiff to submit himself to a personal examination, for the purpose of ascertaining the nature, character, extent and permanency of his injuries; but of course the court should exercise a sound judicial discretion in making such an order. The right to the order, being founded upon necessity, would not of course extend beyond the necessities of the case. If sufficient evidence of this kind had already been introduced, the court of course would not be bound to make the order for the purpose of obtaining other merely cumulative evidence. This principle will perhaps explain the ruling of the Missouri court in the case of Loyd v. The H. & St. J. Rld. Co., *ante*, for the court in that case in deciding the question says that "There was abundant evidence upon the subject on *both* sides; any opinion of physicians or surgeons at that time would have only been cumulative evidence at best." The court of course would not be required to order an examination of the plaintiff by a greater number of experts than was actually necessary for the purpose of justice, and it would not be required to make the order unless the proposed experts were really competent to make the examination. The court would

also have the right to exercise its discretion in other particulars as suggested by the decision in the Iowa case.

As before stated, we think the court below in refusing to make any order in the present case, did so solely upon the grounds that such a practice is unknown to the law, and that the court had no power to enforce such an order. In this we think the court below was mistaken. We think the order should have been made; and that the court had ample authority to enforce the same if it had been made and resisted.

Reversed and remanded for new trial.

STATE OF IOWA v. HARVEY.

112 Iowa 416. (1900)

LADD, J. It is enough now to say that the evidence was such as to leave the question of defendant's guilt of begetting complainant's child, then 9 months old, at the least doubtful. Her story implicating him, appears not very probable, and her admission of having had intercourse with Waller a year previous to its conception, and sleeping alone in a room accessible to the latter continually up to that time, indicates, notwithstanding her denial of repetition, the possibility of its having been his offspring. So that the introduction of the immature child in evidence "for the jury to look at; to examine as to the identity and resemblance between the baby and putative father" —as stated by counsel for the state—may well have played an important part in settling the controversy. The color of its eyes and hair, its complexion, the contour of the brows and shape of hands, any or all of which may have related back three or four generations, doubtless were given weight in making this comparison. What they were we have no means of knowing, nor does this record disclose in what respects these differed from or resembled the hair, eyes, complexion, brows, or hands of defendant, or of Waller. Thus, the jury based their verdict in part at least, on their individual knowledge of facts, or opinions resting on facts, of which this court, on appeal, can acquire no information, making of themselves "silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of errors, if any, could be afforded either party." See Close v. Samm, 27 Iowa

507; Washburn v. Railway Co., 59 Wis. 370 (18 N. W. 328). In such a case might a new trial ever be ordered because of the insufficiency of the evidence? Nevertheless in this court in State v. Smith 54 Iowa 104, held that a child 2 years and 1 month old might be exhibited to the jury, though to exhibit one of three months had been adjudged an error in State v. Danforth, 48 Iowa 43. While conceded ceding that "resemblances often exist between persons who are not related, and are wanting between persons who are, "the ruling seems to rest on the proposition that "what are called 'family resemblance' are sometimes so marked as scarcely to admit of a mistake." With respect to proper age, it was said that a child which is only 3 month's old has that peculiar immaturity of features which characterizes an infant during the time that it is called a 'babe'. A child 2 years old or more has, to a large extent, put off that peculiar immaturity." If this is to be the criterion, then, surely, a child of 9 months is too immature to afford aid to the jury in settling its paternity. True, resemblances then are frequently imagined. But what one will construe as a similarity, another, with the same knowledge of the parties between whom the comparison is made, will be unable to detect. If alike in some respects, they differ in others. It is all a matter of notion, fancy or guesswork, and ought to be given the slightest weight in determining an issue fraught with such grave consequences. In People v. Carney, 29 Hun, 47 the court, observing that children of the same family have eyes and hair of different colors, declared that it is "a dangerous doctrine to permit a child's paternity to be questioned or proven by the comparison of the color of its hair or eyes with that of the alleged parent." In Hanawalt v. State, 64 Wis. 84 (24 N. W. 489), the exhibition of a child under a year old was held to have been improper, the court saying, "In any case this kind of evidence is inherently unsatisfactory, as it is all a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there be any; and, when applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury." As opposed to such exhibitions, see, also, Clark v. Bradstreet, 80 Me. 466 (15 At. 56, 6 Am. St. Rep. 221); Risk v. State, 19 Ind. 152; Reitz v. State, 33 Ind. 187; Ingram v. State, 24 Neb. 33 (37 N. W. 943). Without expressing an opinion as to the correctness of State v. Smith, *supra*, this court

is not prepared to extend the rule there approved, and sanction the exhibition of a child under 2 years of age to the jury, as affording any aid in ascertaining its parentage; and in this class of cases, where it is well known, the feelings and sentiments so often enter into the contest the exhibition of the fruit of the unlawful relation cannot have been otherwise than extremely prejudicial. An exception may, however, exist where the parents are alleged to be of different races. Garvin v. State, 52 Miss. 207; Warlick v. White, 76 N. C. 176. In Gilmanton v. Ham, 3 N. H. 108, and Finnegan v. Dugan, 14 Allen, 197, the age of the child exhibited does not appear, while comparison at any age was upheld in Grant v. State, 50 N. J. Law, 490. (14 At. 600), and State v. Woodruff, 67 N. C. 89. See also, Jones v. Jones, 45 Md. 151. These decisions seem to have been influenced somewhat by the ruling of Lord Mansfield in the Douglas Case, before the house of lords in 1769, allowing resemblance of adults to be shown. That marks of family resemblance often exist between adults and even mature children may readily be conceded, but it does not follow that this is generally true of nursing or immature babes, with unsettled features, and peculiar characteristics undeveloped.

Reversed.

MARCY v. BARNES.

82 Mass. 161. (1860)

Action of contract. Trial and verdict for the plaintiff in this court before Hoar, J.

MERRICK, J. This is an action to recover the contents of the promissory note declared on, purporting to be signed by all the defendants. Zephaniah Baker & Co. were defaulted, and Moses Barnes alone interposed any defense. In his answer, he denied the genuineness of the signature of his name which appears upon it, and alleged that it had been fraudulently placed there. This constituted the issue to be determined; and it was conceded at the argument by the counsel of both parties that the precise question which arose and was contested upon the trial was whether the name of Moses Barnes was affixed to the note before or after it came into the possession of the plaintiff.

The magnified photographic copies of the genuine signatures of the

defendant, and of the disputed signature, which was submitted to the inspection of the jury, were, we think, in connection with the testimony of Mr. Southworth, admissible in evidence. Assuming it to be true, as he testified, which yet was a fact first to be considered and determined by the jury, that the copies were accurate in all respects, excepting only in relation to sex and color, they were capable of affording some aid in comparing and examining the different specimens of handwriting which were exhibited in the trial. It is not dissimilar to the examination with a magnifying-glass. Proportions are so enlarged thereby to the vision, that faint lines and marks, as well as the genuine characteristics of handwriting which perhaps could not otherwise be clearly discerned and appreciated, are thus disclosed to observation, and afford additional and useful means of making comparisons between admitted signatures and one which is alleged to be only an imitation. Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such prepared representations of original and genuine signatures as evidence competent to be considered and weighed by the jury.

Exceptions sustained on another ground.

SMITH v. LEHIGH VALLEY R. R. CO.

177 N. Y. 379. (1904)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 13, 1903, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial.

This action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of defendant.

PARKER, Ch. J. We are also of the opinion that the court erred in admitting in evidence the photograph of deceased. The action was to recover for pecuniary injuries resulting from deceased's death. (Code Civil Pro. sec. 1904.) Such injuries are to be compensated for on the basis of the monetary value of the services of deceased

to her husband and children. Into such a case the personal element does not enter, for the law does not compensate for grief or sorrow, but only for the actual pecuniary loss. The introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury. Certainly the language employed in Lipp v. Otis Brothers & Co. (161 N. Y. 559, 564) would seem to be applicable to the introduction of this photograph: "Clearly, the testimony we have been considering could not render any service in the case other than to awaken the sympathies, and thus influence the judgment of the jurors in the direction of a greater award, nor is it reasonable to assume that any other result was expected from it." In that case this court reversed a judgment obtained by a father as sole next of kin, for pecuniary injuries resulting from his son's death. No one except the father was entitled to recover, and yet plaintiff was permitted to question a brother of deceased as to brothers, sisters, nephews and nieces of deceased, and their necessities—testimony which pointed out opportunities plaintiff would have for making charitable use of any moneys left after satisfying his own necessities. The reason for the decision in that case calls for a decision in this that evidence of such a character should not be received in cases where the personal element is not permitted by the statute to enter, as in this case.

The judgment should be reversed and a new trial granted, with costs to abide the event.

THE CITY OF OTTAWA v. ROZETTA GILLILAND.

63 Kan. 165. (1901)

GREENE, J. The defendant in error commenced this action against the city of Ottawa to recover damages for personal injuries which she claims she sustained by reason of having been tripped or thrown on a defective sidewalk. In the court below she recovered judgment. The plaintiff in error, the defendant below, filed its motion for a new trial alleging all the grounds mentioned in the statute.

Counsel for plaintiff in error present another question which will likely arise in a new trial of this cause, and for this reason it demands the attention of this court at this time. Upon the trial, defendant

requested the court to appoint two reputable physicians and make an order that the plaintiff below submit to an examination by them, for the purpose of ascertaining the location and extent of her physical injuries. To this the plaintiff below objected, which objection was sustained by the court, and the defendant below alleges this as error.

In actions for personal injuries, the exact location and extent of the injury is frequently the very question in dispute, the fact to be ascertained. While the court in the exercise of its discretion should protect the feelings and sensibilities of all litigants, the rights of the parties and the ascertainment of the truth is the chief object of a trial. The purpose of a trial is to mete out exact justice. This cannot be accomplished when the truth is suppressed, and this may be done, if the court has not the power to ascertain what the truth is.

In an action for personal injuries, the injured party may call physicians, to whom he may expose his person, not for the purpose of effecting a cure, but for the purpose of using this expert testimony to assist him in the trial of his case. He may also expose the injured portion of his person to the jury, observing the rules of decency. Should the litigant be permitted to withhold the truth or the means of ascertaining what the truth is simply because, in the ascertainment of the truth, he may conceive the idea that an indignity is being offered? That is not an indignity which is not so intended. May he be permitted to present so much of the truth as he desires and as he thinks to his interest and withhold the remainder? This would certainly be his privilege if the court does not possess the power to make an order that will develop the exact truth. It is suggested by some of the authorities which hold contrary to the views herein expressed, that the rule would operate harshly upon delicate and modest females. We think such may safely rely upon the courts of this country. An examination should not be ordered needlessly, or where there might be a shock to one's modesty or feelings of delicacy. We only decide that the court has the power; it should be exercised according to the sound discretion of the presiding judge. It is safer in the administration of justice to trust to the courts to protect the sensibilities of the parties in such examinations, so far as it is possible to do so, and beyond that to hold them subordinate in importance and sacredness to the interest of justice than to hold that the party to a litigation has it within his power to develop so much of the facts as may appear to be to his interest and then stop the investigation.

The great weight of authority seems to favor this view. In the ascertainment of the physical condition of the litigants in divorce ac-

tions, a physical examination was allowed at common law. (Devanbagh v. Devanbagh, 5 Paige 553, 28 Am. Dec. 443; Newell v. Newell, 9 Paige 25.) The authorities supporting this doctrine in actions for personal injuries are numerous and ample.

We are of the opinion that the trial court has the power, in actions for personal injuries, to require the plaintiff to submit to a private physical examination by a board of physicians selected by the court; that such power should be exercised cautiously and only when necessary to a full determination of the facts, and with every care possible to protect the feelings and sensibilities of the party. In this case, the court did not abuse its discretion.

Reversed on other grounds.

STATE v. ANICA GARRETT AND LUCY STANLEY.

71 N. C. 85. (1874)

Indictment for murder, tried at Fall Term, 1873, of the Superior Court of Washington county, before his Honor, Judge Moore.

The prisoners were charged with the murder of Alvina Garrett, a girl of fourteen years of age; on the trial, Lucy Stanley was acquitted.

The evidence for the state established that on the 26th of August, 1873, the prisoners made an out-cry that the deceased came to her death by her clothes accidentally catching fire while she was asleep; and when the witness reached the house where the body of the girl, and where the prisoners were, Anica Garrett told the witness that "she" Anica, "was asleep when she was awakened by the deceased screaming; that she went to her, her clothes were still burning, and in attempting to put out the flames, she Anica, burnt one of her hands."

By Dr. Walker, the examining physician on the Coroners inquest, it was proved that the body of the deceased girl was not burned before, but after death, there being no serum in the blisters, &c.

The prisoner, Anica, while under arrest, and very much agitated before the Coroner, and after the jury had rendered their verdict against her, in their presence, was ordered by the Coroner to unwrap her hand she alleged had been burnt, and show it to Dr. Walker, so that it might be seen if it had been burned or not. This she did, and there was no indication whatever of any burn upon it. This evidence was objected to by the counsel for the prisoner because it was in substance compelling the prisoner to furnish evidence against herself; and that being under

arrest, and alarmed, nothing which she had said or done while under arrest, and at the Coroner's command, was admissible in evidence against her, she not having been cautioned and informed of her rights according to law.

The court ruled that anything the prisoner said at the inquest was inadmissible, but that the actual condition of her hand, although she was ordered by the Coroner to unwrap it and exhibit to the doctor, was admissible as material evidence to contradict her statement to the witness on the night of the homicide and before she was arrested. To this ruling, counsel for prisoner excepted.

The jury returned a verdict of guilty. Rule for a new trial, granted and discharged. Judgment of death and appeal by prisoner.

BYNUM, J. The prisoner objected to the admissibility of the evidence as to the condition of her hand and relied upon the case of the State v. Jacobs, 5 Jones, 259.

The distinction between that and our case is that in Jacobs' case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error.

In our case, not the prisoners, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation.

The prisoner had alleged that she had her hand burned in endeavoring to extinguish the fire upon the deceased, and at the Coroner's inquest she carried her hand wrapped up in a handkerchief and thus concealed it from view. She was made to unwrap and show her hand to the physician, which thus exposed, upon examination, showed no indication of a burn. It was evidently a fraud adopted to give countenance and support to her story, and the Coroner was justified in exposing a trick upon the public justice of the country.

The later cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by declaration, inadmissible, *per se*, as having been obtained by improper influence. Arch. Crim. Pl., 131, and note by Waterman, State v. Johnson, 67 N. C. 55. Familiar illustrations are where the accused is, by force, made to put his foot in a track, or allow the foot to be measured, where he is by duress compelled to produce stolen goods, or to disclose their hiding place, and they are there found. In these cases the facts thus brought to light are competent evidence though the declara-

tions of the accused, made at the time, are excluded as having been obtained by improper influence.

We have carefully examined the whole record, and we find no defect therein.

There is no error. This will be certified to the Court below that further proceedings be there had, according to law.

Judgment affirmed.

PER CURIAM.

STATE v. LINKHAW.

69 N. C. 214. (1873)

Defendant was indicted for disturbing a religious congregation. The evidence as detailed by several witnesses was substantially this: Defendant is a member of the Methodist Church; he sings in such a way as to disturb the congregation; at the end of each verse, his voice is heard after all the other singers have ceased. One of the witnesses being asked to describe defendant's singing, imitated it by singing a verse in the voice and manner of defendant, which "produced a burst of prolonged and irresistible laughter, convulsing alike the spectators, the Bar, the jury and the court."

There was a verdict of guilty. Judgment, and appeal by the defendant.

SETTLE, J. The defendant is indicted for disturbing a congregation while engaged in divine worship, and the disturbance is alleged to consist in his singing, which is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.

From the evidence reported by his Honor who presided at the trial, it appears that at the end of each verse, his voice is heard after all the other singers have ceased, and that the disturbance is decided and serious; that the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it; to all of which he replied that he would worship his God, and that as part of his worship it was his duty to sing. It was further in evidence that the defendant is a strict member of the church and a man of most exemplary deportment.

"It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation; but on the con-

trary, it was admitted that he was conscientiously taking part in the religious services."

This admission by the State puts an end to the prosecution. It is true, as said by his Honor, that a man is generally presumed to intend consequences of his acts, but here the presumption is rebutted by a fact admitted by the State.

It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the courts.

Venire de novo.

PER CURIAM.

OSBORNE v. CITY OF DETROIT.

32 Fed. Rep. 36. (1886)

BROWN, J. The plaintiff in this case obtained a verdict of $10,000 for personal injuries received by her in falling upon a defective sidewalk upon the north side of Church street in this city, between Michigan and Trumbull avenues. Defendant now moves for a new trial upon the following grounds.

That the court erred in permitting the exhibition of the plaintiff and her condition to the jury by Dr. Gaylord. The doctor, who had not been sworn, exhibited the plaintiff to the jury, and thrust a pin into the right side of her face, her right arm and leg, and, from the witness' failing to wince, the jury were asked to infer that there was a complete paralysis of her right side. Objection was made to this upon the ground that the doctor was not sworn as to the instrument he was using, nor was the plaintiff sworn to behave naturally while she was being experimented upon. It is argued that both the doctor and plaintiff might have wholly deceived the court and jury without laying themselves open to a charge of perjury, and that plaintiff was not even asked to swear whether the instrument hurt her when it was used on the left side, or did not hurt her when used on the right side; in short, that there was no sworn testimony or evidence in the whole performance and no practical way of detecting any trickery which might have been practiced. We know, however, of no oath which could be administered to the doctor or the witness touching this exhibition. So far as we are aware, the law recognizes no oaths to be administered upon the witness stand except the ordinary oath to tell

the truth, or to interpret correctly from one language to another. The pin by which the experiment was performed was exhibited to the jury. There was nothing which tended to show trickery on the part of the doctor in failing to insert the pin as he was requested to do, nor was there any cross-examination attempted from the witness on this point. Counsel were certainly at liberty to examine the pin and to ascertain whether in fact it was inserted in the flesh, and having failed to exercise this privilege, it is now too late to raise the objection that the exhibition was incompetent. It is certainly competent for the plaintiff to appear before the jury, and, if she had lost an arm or a leg by reason of the accident, they could hardly fail to notice it. By parity of reasoning, it would seem that she was at liberty to exhibit her wounds if she chose to do so, as is frequently the case where an ankle has been sprained or broken, a wrist fractured, or any maiming has occurred. I know of no objection to her showing the extent of the paralysis which has intervened by reason of the accident, and evidence that her right side was insensible to pain certainly tended to show this paralyzed condition. In criminal cases it has been doubted whether the defendant could be compelled to make profert of his person, and thus, as it were, make evidence against himself. The authorities upon this subject are collated in 15 Cent. Law J. 2, and are not unequally divided, but we know of no civil case where the injured person has not been permitted to exhibit his wounds to the jury.

In Schroeder v. Railroad Co., 47 Iowa, 375, it was held not only that the plaintiff would be permitted, in actions for personal injuries to exhibit his wounds or injuries to the jury, but that he might be required by the court, upon proper application therefore by the defendant, to submit his person to an examination for the purpose of ascertaining the extent of such injuries, and upon refusal might be treated as in contempt. See, also, Mulhado v. Railroad Co., 30 N. Y. 370.

Judgment on the verdict.

STATE v. ISAACSON.

8 So. Dak. 69. (1895)

FULLER, J. Under Sec. 6884 of the Comp. Laws, plaintiff in error was indicted for, and upon the trial found guilty of the offense of maliciously exposing a poisonous substance, with the intent that the same

should be taken by an animal, to wit, a certain horse.

Over the objection of counsel for the accused the prosecuting witness and owner of the horse mentioned in the indictment was allowed to testify as follows: "As soon as the horse died, Andrew Melander and myself cut the horse open and took out the contents of his stomach. I administered some of the contents of the stomach of said horse to a hen on the 11th day of May, 1895, and the hen died in ten or twelve minutes from the effects thereof." We think the evidence as to what he did was admissible. A non-expert, shown to be familiar with evidentiary facts, may, when the expression of an opinion is not involved, ordinarily state the result of his observations with reference to such facts. An ordinary nonprofessional witness in possession of his faculties, who takes a section from the stomach of a horse, and feeds it to a hen, which dies in ten minutes after eating the same, may testify as to such facts, when material, for the same are as observable to him as a professional witness. The objection, as made, did not go to the qualification of the witness, but was specifically directed to the evidence "relating to the administration of said contents to said hen," and not to the opinion of the witness as to the cause of the hen's death; and as no motion was made to strike out such evidence, counsel's contention concerning the same cannot prevail.

A regardful examination of the record as presented discloses no prejudicial error, and the judgment of conviction is affirmed.

JONES v. ROYSTER GUANO COMPANY.

6 Ga. App. 506. (1909)

Jones brought suit against the Royster Guano Co. seeking to recover damages for the erection and maintenance by the defendant of a fertilizer factory near his home in such a manner as to create a nuisance.

The hydrochloric acid gas, sulphuric acid gas, flourine gas, and other gases generated in the factory killed vegetables in the plaintiff's garden, and corn and other crops growing in his field, and he had become discouraged and had stopped trying to grow anything on his land. Just about the time the corn would begin to tassel it would be attacked by the gases and other substances from the factory and killed. The flowers in the yard had been dwarfed and killed.

The defendant's testimony tended to show that this was one of the largest fertilizer factories in the southern states, and probably the best equipped. It is equipped with the very best obtainable condensers for the purpose of preventing the escape of gases and fumes, and every possible precaution is taken to keep the factory from being objectionable and offensive to people living in the community. It is absolutely impossible to condense all the gases, and, when the wind is strong, some of them escape into the surrounding atmosphere, and to some extent affect vegetable and plant life.

RUSSELL, J. The evidence was in sharp conflict as to every material issue in the case, both as to the manner in which the factory was operated and as to the extent of the damage suffered by the plaintiff in and around his premises. The defendant denied that the gases, fumes, etc., had killed any vegetation about the factory as claimed by the plaintiff's witnesses. Over the objection of the plaintiff the judge allowed the jury to make a personal inspection of the defendant's factory and of the plaintiff's premises. The plaintiff excepts to this ruling. This was a matter resting in the sound discretion of the trial judge. County of Bigg v. Reese, 115 Ga. 346.

Reversed on another ground.

THE PEOPLE v. JAMES HOPE.

62 Cal. 291. (1882)

Appeal from a judgment of conviction and from an order denying a new trial in the Superior Court of the City and County of San Francisco.

SHARPSTEIN, J. Among the articles exhibited in the presence of the jury was a "cylindrical steel bar about half an inch in diameter and about eight inches long, which he (the witness exhibiting it) said he had made for the purpose of screwing upon it the said coupling or sockets—one of which was found in the hole over the bank vault and the other in the trunk of the defendant. The court, against the objection of the counsel of appellant, permitted the witness "to make experiments in the presence of the jury with the couplings or sockets attached to said cylindrical bar." The ground of the objection was that the cylindrical bar was not in evidence. It had not been formally offered in evidence, and the counsel for the prosecution stated that

they did not intend to offer it in evidence. But the witness had exhibited it on the witness stand, and had stated that he had it made for the purpose of screwing "said coupling or sockets" upon it. The object of screwing "said coupling or sockets" upon it is not stated, nor to us apparent. Still, in support of the correctness of the ruling of the court below we are bound to presume, unless the contrary appears, that the object was a legitimate one. Perhaps the use to which the coupling or sockets might be put, could be made more clear by screwing them upon said cylindrical bar. It was not objected that the witness was not an expert, and we are unable to determine from anything before us that it was not necessary for him to use said cylindrical bar in order to elucidate and illustrate clearly the character of the "coupling or sockets" which had been admitted in evidence. It was not only proper, but of the first importance, that the prosecution should show that the implements found on the vault, and in the appellant's trunk, were "burglars' tools." And we must presume that it was for that or some other legitimate object that the witness was permitted to experiment with some of them in the presence of the jury, and that he was allowed to use an instrument of his own for the purpose of making the experiment better understood than it otherwise would be. The objection to the question put to the witness Aiken was properly overruled.

Judgment and order affirmed.

PEDIGO v. COMMONWEALTH.

103 Ky. 41. (1898)

DURELLE, J. Appellant was indicted jointly with Worth Wilson for burning the stock barn of L. W. Preston, on March 10, 1897, and, having been given a separate trial, was found guilty and sentenced to three years' confinement in the penitentiary.

Upon the trial, Preston testified that, at ten minutes of nine in the evening, he discovered the fire coming through the barn from the southwest corner; and that he thereupon "telegraphed to Neighbors, at Elizabethtown, and got his bloodhound, that arrived the next day at noon, and carried him to the rear of the southwest corner of the barn; and the dog took a track and went in a south direction to the lane, and went down the lane three panels, and crossed the fence

through the place of Spencer into the street, and then up the street toward the dormitory, and up to the house of Nan Tunstel's, opposite the dormitory. The dog was then taken to the alley that leads out of the street, east, from the one on which the dormitory is situated; and the dog took a track then, and followed it up that street through the plank fence through Mr. Joe Smith's, following a path into the Knox road, out that road to Dolph Depp's gate, crossed the fence in a low place near the gate, and then through the swamp into the field toward my barn that was burned."

It is difficult to lay down a general rule as to the introduction of testimony of this kind. It is matter of common knowledge, of which courts are authorized to take notice, that dogs of some varieties (as the bloodhound, foxhound, pointer and setter) are remarkable for the acuteness of their sense of smell, and for their power of discrimination between the track they are first laid on and others which may cross it; but it is also matter of common knowledge that all dogs do not possess this power in the same degree, and that some dogs of purest pedigree prove worthless upon trial.

After a careful consideration of this case by the whole court, we think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail whether visible or not, concerning which, testimony has been admitted at a point where the circumstances tend clearly to show that the guilty party had been or upon a track which such circumstances indicate to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury.

For the reasons stated, the judgment is reversed and the cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

DAVIS v. STATE.

46 Fla. 138. (1903)

COCKRELL, J. Charlie Davis was indicted in one count for breaking and entering a dwelling house with intent to commit the felony of larceny. The indictment charged that at the time of such breaking and entering the defendant was armed with a dangerous weapon and also that he made an actual assault upon a person who was lawfully in said dwelling. He was convicted and sentenced to life imprisonment.

Testimony was admitted over the defendant's objection as to the action of two dogs in following the supposed trail of the burglar from the scene of the crime. As this case is to be reversed on another point, we need not determine its admissibility, but think it proper to notice certain requirements in the introduction of such evidence. The adjudged cases on this point are few but uniform in admitting such evidence under proper conditions. Pedigo v. Commonwealth, 103 Ky. 41, 44 S. W. 143, 42 L. R. A. 432, S. C. 82 Am. St. Rep. 566; Hodge v. State, 98 Ala. 10, 13 So. 385; Simpson v. State, 111 Ala. 6, 13 So. 572. But in order that such testimony be admissible there must be preliminary proof of such character as to show that reliance may reasonably be placed upon the accuracy of the trailing attempted to be proved. Their should first be testimony from some person who has personal knowledge of the fact that the dog used has an acuteness of scent and power of discrimination which have been tested in the tracking of human beings. The intelligence, training and purity of breed are all proper matters for consideration in determining the admissibility of such evidence, as is also the behavior of the dog in following the track pointed out. In the record before us there is no proof of the breed of the dogs, and while there is proof that they had been trained for six months, there is no proof that they were trained in the tracking of human beings. It is questionable whether this is sufficient.

Reversed on another ground.

BROTT v. STATE.

70 Neb. 395. (1903)

SULLIVAN, C. J. George W. Brott was charged with burglary and convicted. The trial court received as evidence of guilt the fact that bloodhounds, after being taken to the place where the crime was committed, appeared to trail the burglar to defendant's house. The competency of this evidence is the only question necessary to consider in disposing of the case. The conduct of the dogs was perhaps, rightly received, in connection with an admission made by Brott, as evidence tending to prove that he committed the crime charged in the information; but it was also received as proof of independent crimes which the state brought to the attention of the jury, to which the admission did not relate. The only evidence of these independent crimes was the inference afforded by the conduct of the dogs. If such evidence is incompetent the conviction can not stand. The argument of the attorney general is that the bloodhound has an exceptionally fine perception of scent; that, in following a trail and discriminating between smells, he seldom or never errs; and that knowledge of his extraordinary aptitude is so nearly universal that courts will act upon it without proof. The bloodhound has, of course, a great reputation for sagacity, and there is a prevalent belief that, in the pursuit and discovery of fugitive criminals, he is practically infallible. It is a common accepted notion that he will start from the place where a crime has been committed, follow for miles the track upon which he has been set, find the culprit, confront him and, *mirabile dictu,* by accusing bay and mien, declare, "Thou art the man." This strange misbelief is with some people apparently incorrigible. It is a delusion which abundant actual experience has failed to dissipate. It lives on from generation to generation. It has still the attractiveness of a fresh creation. "Time writes no wrinkle on its brow." But it is, nevertheless, a delusion, an evident and obvious delusion. The sleuthhound of fiction is a marvelous dog, but we find nothing quite like him in real life. We repudiate utterly the suggestion that there is any common knowledge of the bloodhound's capacity for trailing, which would justify us in accepting his conclusion as trustworthy under circumstances like those disclosed by the present record.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed.

COUNTY OF BIBB v. REESE.

115 Ga. 346. (1902)

SIMMONS, C. J. Mrs. Reese brought her action against Bibb county, alleging that the officers and agents of the county had damaged her by cutting down the road-bed in front of her premises in such a manner as to render ingress and egress impossible, and to greatly injure the value of her property. Upon the trial of the case the plaintiff proved that her property had been injured, and the jury returned a verdict in her favor for $1,500. The county made a motion for a new trial on various grounds, which was refused, and it excepted.

One ground of the motion for a new trial complains that the court below erred in directing, over objection of counsel for the defendant, that the jury be taken to view the premises alleged to have been damaged. It appears that, in compliance with a request of counsel for the plaintiff, the court directed the sheriff and a bailiff to procure carriages and take the jury to the premises, the judge accompanying them in another carriage. This is the first time that the question here presented has ever been squarely before this court for determination. From an investigation of the subject we find that prior to the act approved February 25, 1784 (Cobb's Dig. 721), adopting as the law of Georgia the common law and such statute law of England, with certain exceptions, as was in force in the colony before the Revolution, it was the law of England that the judge, in all real and mixed actions, might in his discretion allow the jury to view the premises. The statute of Anne, c. 16, sec. 8, recognized the right of trial by view, and prescribed the mode of procedure to be had therein. Considerable difficulty having been experienced through a misunderstanding of the meaning of the statute referred to, "in 1757, Lord Mansfield and the other judges took it upon themselves to remedy this state of affairs, and declared that they were clearly of the opinion that a view should not be granted unless the court were satisfied that it was proper and necessary." 26 Cent. L. J. 436. See also 1 Co. Lit. 158b; 5 Bac. Abr. (title juries) 372; Stearns on Real Actions, 102; 2 Tidd. Pr. 796; Andres Steph. Pl. sec. 109; 1 Thomp. Tr. secs. 875 *et seq.*; 22 Enc. Pl. & Pr. 1053 *et seq.*; Springer v. Chicago (Ill.) 35 Am. & Eng. Cas. 180, 186; and the well-written article in 26 Cent. L. J., above cited, in which the question is fully discussed and the authorities collected. It seems that at common law this right of the judge to permit the jury to view the premises existed only in real and mixed actions, and did

not extend to personal actions and criminal actions without the consent of both parties. The legislature of this State having in 1784 adopted the common law of England as it existed prior to 1776, including this right of trial by view in the discretion of the trial judge, and no repealing statute ever having been passed, that law is still of force in Georgia; as much so as if the legislature had expressly enacted it. The present case being an action to recover damages to land, the trial judge had the right, with or without the consent of the parties, to direct the jury to view the premises. The reason for allowing the judge this authority is fully set out in some of the cases above cited, especially in the case of Springer v. Chicago, from the Illinois Supreme Court. But whatever the reasons may be, whether good, bad or indifferent, it is the law of this State, the courts are bound by it, and this court has no power to reverse a trial judge for adhering to it, unless there has been an abuse of discretion. It was, therefore, not error for the court below to allow the jury to view the premises in the present case.

Reversed on another ground.

PETERSON & LOTT v. LOTT.

11 Ga. App. 536. (1912)

RUSSELL, J. This was a claim case. The property involved was personal property. It is assigned as error that the court permitted the jury, over the objection of the plaintiff in *fi. fa.*, to go out into the court-yard and view the mule which had been levied on and which was claimed. At common law an inspection is permitted where the subject-matter of the suit is real or mixed property, but the jury could not view personal property if such was the subject of litigation. Inasmuch as by our adopting statute of 1784 the common law became of force in this State, it would seem that a trial court is not authorized, as a matter of judicial discretion, to have personal property, where such personal property is the subject-matter of the action, inspected by a jury. Perhaps the consent of both parties will be such a waiver of the error that neither could except. But it is our opinion that if either party objected it would be ground for a new trial. At common law the right to demand a view appertained only to real and mixed actions. "In the United States," as said by Mr. Thomp-

son, in his work on Trials (sec. 881), "the subject is one generally of statutory regulations, and it has been held not competent for the court to order a view against the objection of a party, except in cases where the view is authorized by statute." It is further pointed out by Mr. Thompson that the courts proceed upon the conception that it is more in consonance with the theory and method of judicial trials that the jury should base their finding solely upon sworn testimony, taken in open court, or upon depositions taken as provided by law. Only four States in the Union (one of which is Georgia) have failed to regulate the matter by statute; Alabama, Louisiana, and Maryland being the other three.

As the case of Jones v. Royster Guano Company, 6 Ga. App. 506, in which the question was involved, was, like the case of County of Bibb v. Reese, *supra,* an action to recover damages to land, the ruling in the latter case was cited and followed. But in the present case the property (which one party desired the jury to view, and to the view of which the other party objected) was personal property (a mule), and as a view of personal property was not permitted by the common law, the judge erred in overruling the objection and in permitting the view. It would seem to be in the interest of justice that all avenues for entry of truth should be permitted, and that the jury should be given the very fullest opportunity to know the exact truth in regard to every material matter involved in a legal investigation; and, for ourselves, we see no reason for any valid distinction between a view of real property and personal property, other than the greater liability of the latter to be subject to alteration and change and even this could be controlled by evidence as to whether there had been any alteration of the subject-matter or not. But, as was remarked by Chief Justice Simmons in County of Bibb v. Reese, *supra,* the adoption of the common law fixed the status of the law of Georgia upon the subject, and, in the absence of any legislation authorizing the court to permit a view of personal property, which is the subject of dispute, it is error to direct the jury to view the property, especially if either party objects.

Judgment reversed.

PART V.
DOCUMENTARY EVIDENCE.

ALTERATIONS.[1]

WOOD v. STEELE.

6 Wall. (73 U. S.) 80. (1867)

SWAYNE, J. The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11th, 1858, for $3,720, payable to their own order one year from date, with interest at the rate of two per cent. per month and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time, it appeared on the face of the note that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury, covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions,—upon whom rested the burden of proof,

[1] Hughes on Evidence, p. 203.

the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month, exonerates the maker who has not assented to it.

Was the instruction given correct?

It was the rule of the common law as far back as the reign of Edward III, that a rasure in a deed avoids it. The effect of alterations in deeds was considered in Pigot's case, and most of the authorities upon the subject down to that time were referred to. In Master v. Miller, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both England and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendent entered. Its identity is changed; another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who

have not consented, and so far as they are concerned, deals with it accordingly.

The instruction was correct and the

Judgment is affirmed.

GREENFIELD SAVINGS BANK v. STOWELL et al.

123 Mass. 196. (1877)

Contract against Cyrus A. Stowell, Timothy D. Richardson and Charles Stowell, upon the following promissory note, in which the words in Roman letters were printed, and those in italics written, and purporting to be signed by the defendants and by George W. Bardwell, whose name appeared first among the signers:

Greenfield Mass. *Sept. 29th,* 1874.

"$467.

"For value received, I promise to pay the Greenfield Savings Bank or order, *four hundred and sixty seven* dollars on demand with interest at the rate of *seven 3-10* per centum per annum payable semi-annually on the first days of June and December of each year."

GRAY, C. J. This action is brought upon a promissory note, signed by George W. Bardwell, Cyrus A. Stowell, Timothy D. Richardson and Charles Stowell, appearing in its present condition, and alleged in the declaration, to be a note for $467. Cyrus A. Stowell and Timothy D. Richardson only defend the action. It is agreed that the note is upon a blank printed form; that, as originally prepared and signed by Bardwell, and signed by the defendants at his request, it was a note for $67; that Bardwell afterwards, without the authority or knowledge or expectation of the defendants, fraudulently prefixed the figure "4" to the figures "67" and the words "four hundred and" to the words "sixty-seven," and in that form, and with no mark or indication or alteration, negotiated it to the plaintiff, who lent him $467 thereon.

The plaintiff contends that the defendants were negligent in signing the note with such blanks as enabled the fraudulent alterations to be made without danger of detection, and are therefore liable to an innocent holder for value upon the note as so altered. But after deliberate advisement, and careful examination of the authori-

ties cited in the learned arguments at the bar, we are of opinion that this position cannot be maintained.

It is a general rule of our law, that a fraudulent and material alteration of a promissory note, without the consent of the party sought to be charged thereon, whether made before or after the delivery of the note, renders the contract wholly void as against him, even in the hands of one who takes it in good faith and without knowledge or reasonable notice of the alteration. Hall v. Fuller, 5 B. & C. 750; S. C. 8 D. & R. 464. Warrington v. Early, 2 El. & Bl. 763. Wood v. Steele, 6 Wall. 80. Angle v. Northwestern Ins. Co., 92 U. S. 330. Fay v. Smith, 1 Allen 477. Draper v. Wood, 112 Mass. 315. Citizens' National Bank v. Richmond, 121 Mass. 110.

Judgment for defendants.

WARDER, BUSHNELL & GLESSNER COMPANY v. WILLYARD.

46 Minn. 531. (1891)

COLLINS, J. This was an action originally brought in justice's court, to recover the sum of $40 alleged to have become due on November 1, 1889, as an installment of the agreed price of a harvesting-machine sold and delivered by plaintiffs to defendant. The latter, by his answer, admitted the sale and delivery, but averred that, in accordance with the terms therewith, he executed and delivered to the plaintiffs his three negotiable promissory notes, each payable to their order, aggregating in amount the stipulated price of the machine; one of the same being for $40, maturing November 1, 1889, and having been given for the identical instalment to recover which the action had been instituted. He further alleged that, after the making and delivery of said note, the plaintiffs, without the knowledge or consent of defendant, wilfully and fraudulently altered the note by changing the amount of the same from $40 to $45. On these pleadings the parties proceeded to trial, although the plaintiffs made and filed a so-called reply, in which the execution, delivery and alteration of the note for $40 were admitted. It was further averred therein that the alteration was not wilful or fraudulent, and that it was made without plaintiffs' knowledge or consent. The plaintiffs

had a judgment, from which an appeal on questions of law alone was taken to the District Court, all of the proceedings and the evidence being returned. The appeal here is from a judgment in plaintiffs' favor in the last-named tribunal.

The paper styled a "reply" was unauthorized as a pleading in the case, and, as such, must be treated as a nullity.

As the plaintiffs could not maintain an action upon the materially-altered promissory note, they were compelled to resort to the original consideration as a foundation for their claim; and the question then arose, and is now presented, of their right to recover on the indebtedness for which the note was given. From an examination of the authorities, it appears to be well settled that a recovery is not permitted, in any form of action, where the holder of a written security or evidence of a debt has altered or changed the instrument in a material part, to his own advantage and with intent to defraud his debtor. The law is stated to be that, when the holder of a bill or note fraudulently alters its legal effect, he not only destroys the instrument by thus destroying its legal identity, but he also extinguishes the debt for which it was executed and delivered. Daniel, Neg. Inst. sec. 1410a; Rand. Com. Paper, sec. 1763; Chalm. Dig. Bills & N. art. 249; Chit. Bills, 1000q, and cases cited in each of these volumes.

We are very clearly of the opinion that, if the alteration of the instrument be a material one, it is presumed to have been fraudulently made, and it is incumbent upon the holder to explain it. The act is apparently fraudulent. It is wrongful, and naturally indicates a wrongful intent which requires an explanation to excuse it. The holder of a note or bill which has been altered in a material part must be required to show that the change was made innocently, or for a proper purpose, or by a stranger, or it would follow that, when the most glaring forgeries have been committed by alterations of negotiable instruments, the maker or the party sought to be charged would have to discover the fraudulent motive of the forger, and establish it by proof. The party in default, and who ordinarily must have knowledge of all the circumstances attending the alteration, must bear the burden of explaining it, and of extricating himself. Daniel, Neg. Inst. secs. 1412, 1413, and Rand. Com. Paper, sec. 1785, with cases cited; Milbery v. Storer, 75 Me. 69; Croswell v. Labree, 81 Me. 44; Robinson v. Reed, 46 Iowa 219.

Judgment reversed.

WILSON v. HAYES et al.

40 Minn. 531. (1889)

This action was brought in the District Court for Crow Wing County, and was tried by Sleeper, J., certain issues as to the fact of time, etc., of the alteration of the note mentioned in the opinion being submitted to a jury. Plaintiff appeals from an order by Holland, J., refusing a new trial.

MITCHELL, J. On August 27, 1885, plaintiff loaned to defendant Douglas $5,000, for which the latter executed his promissory note, secured by a mortgage on certain real estate upon which he had executed a prior mortgage to the Minneapolis Loan & Trust Company. It had been previously agreed between plaintiff and Douglas that plaintiff was "to take an assignment" of the prior mortgage, and that Douglas should have three years in which to redeem the property. In September, 1885, Wilson indorsed and sold Douglas's note to the Bank of Minneapolis, but made no formal assignment of the mortgage. Wilson not having obtained any assignment of the Loan & Trust Company's mortgage, and default having been made in its conditions, the company foreclosed and bid in the property on the 23rd of July, 1887, and subsequently transferred the certificate of sale to defendant Hayes, who was a judgment creditor of Douglas, junior to both mortgages. Shortly before the expiration of the time of redemption, Wilson applied to Hayes for an assignment of the certificate of sale, which the latter refused to give. Thereupon Wilson repurchased Douglas's note from the Bank of Minneapolis, filed his intention to redeem as mortgagee, and on July 25, 1888, presented to the sheriff who made the sale his mortgage and affidavit required by statute, and tendered the proper amount of money, and demanded a certificate of redemption. The sheriff, at the instance and direction of Douglas and Hayes, refused to accept the money or allow plaintiff to redeem. Hayes now claims to own the property under the foreclosure of the trust company mortgage. Plaintiff brings this action to enforce his right of redemption.

The last and principal defense is that Wilson fraudulently altered the note secured by the mortgage, after its execution, by erasing the word "annually" and inserting the word "quarterly," so as to make the interest payable quarter-yearly instead of yearly, thereby destroying the instrument and extinguishing the debt. Plaintiff interposed a reply putting in issue the alteration, and further alleg-

ing (as we may fairly construe it in the absence of any specific objection to the pleading) that Douglas had ratified the note in its present condition by paying interest on it, with full knowledge of all the facts. Upon this issue as to the alteration of the note the court submitted certain questions to the jury, their answers to which were in substance that the note was altered after its execution, without the knowledge or consent of Douglas, by some one to the jury unknown, but by and with the knowledge and authority of Wilson.

The court, at the request of defendants, and against plaintiff's objection, instructed the jury, that in the absence of any evidence as to when the alteration was made, it would be their duty to find that it was made after delivery; that such was the presumption of law, in the absence of explanation; and that the burden of proof was upon plaintiff, as holder, to show that it was made before execution. This instruction, in various forms, was repeated and emphasized, and is here assigned as error. The question of presumption and burden of proof, where interlineations or erasures appear on the face of an instrument, is one upon which there is a wilderness of authorities and much conflict of opinion. Any attempt to cite or consider the innumerable cases on this question would be both impracticable and useless. The rule adopted by some authorities is that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and therefore that no explanation is required in the first instance; while others hold, in accordance with the instruction of the trial court in this case, that the presumption of law is that the alteration was made after delivery, and therefore the burden is upon the holder to explain it, and show that it was made under circumstances that would not invalidate the instrument. In addition to these two leading and opposing views, different courts have adopted certain intermediate or compromise rules, none of which need be here referred to, except one, seemingly adopted by some very eminent courts, to wit, that the alteration raises a presumption against the instrument when it is suspicious; otherwise, not. But this furnishes no definite rule by which to determine when it is not. Who is to determine, and by what test, whether the alteration is suspicious? And, if held suspicious, when must it be explained, —before or after it is admitted in evidence? Evidence as to when, by whom, and with what intent, an alteration was made may be one or both of two kinds, extrinsic or intrinsic; the latter being that furnished by the inspection of the instrument itself, such as its appearance, the nature of the alteration, etc. These things, considered

in connection with the relation of the parties to the instrument may often constitute important evidence. And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law, it is simply an inference of fact drawn from evidence in the case.

The doctrine that the presumption of law is that the alteration was made after delivery, and that the burden is on the holder in the first instance to explain it, seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. Moreover, all disputable presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts; the one being usually found to be the companion or effect of the other. Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts.

The mere existence of an interlineation or erasure in an instrument would not naturally or ordinarily produce an inference in the minds of men that it had been fraudulently altered after execution. Indeed, unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be that it was a legitimate part of the instrument, and was made at or before its execution. We are therefore of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery; or, perhaps, to state the proposition with more precision, the proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act and this *prima facie* evidence will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and that the question when, by whom and with what intent, the alteration was made, is one of fact, to be submitted to the jury upon the whole evidence, intrinsic and extrinsic.

Many authorities, however, while admitting that the general rule is that the law presumes that an alteration in an instrument is a legitimate part of it until the contrary appears, hold that this rule

does not extend to negotiable securities. Most of the text-books seem to lay this down as the law, but at the same time admit that the opposite view has the sanction of eminent judicial authority.

Our conclusion, therefore, is that the instruction of the court below was erroneous, and for that reason the order refusing a new trial must be

Reversed.

WADE v. WITHINGTON.

83 Mass. 561. (1861)

Contract by the indorsee against the maker of a promissory note for one hundred and forty dollars. The answer denied the making of the note, and averred that it had been fraudulently altered after it was signed, by the addition of the words "and forty," so as to make it appear to be a note for one hundred and forty dollars instead of for one hundred dollars.

BIGELOW, C. J. The only point on which the plaintiff now insists in support of his exceptions is, that the judge omitted to instruct the jury, that if the alteration in the note was such that it could not be detected on a careful scrutiny, it would not be a defense against the note in the hands of the plaintiff, who was an indorsee for a valuable consideration. But we do not understand such to be the rule of law. On the contrary, the well settled doctrine, is, that a material alteration in a bill or note, after its execution and delivery to the payee, or after its endorsement, vitiates the instrument except as against parties consenting to the alteration. Master v. Miller, 4 T. R. 320. S. C., 2 H. Bl. 140. Chit. on Bills (8th ed.) 204. Davis v. Jenney, 1 Met. 221. Fay v. Smith, *ante*, 477. This doctrine rests on the principle that parties can be held liable only on their contracts as originally made and entered into by them. The identity of the instrument with that which was executed by the defendant is an essential element in every action upon a wrtten contract, from which his assent to its terms may be fairly presumed. If this is changed by a material alteration without the privity of the party liable upon it, it ceases to be his contract. It is a mistake to suppose that any different rule in this particular is applicable to promissory notes and bills of exchange from that which governs deeds and other con-

tracts. The law in giving peculiar sanction to negotiable paper in order to secure its free circulation and to protect *bona fide* holders for value who receive it before its maturity, does not go to the extent of holding a party liable on a contract into which he never entered, and to which he has not given his assent.

The case of Young v. Grote, 4 Bing. 253; S. C., 12 Moore 484, on which the plaintiff relies, is very different from the case at bar. There a check was filled up by the agent of the drawer for a certain amount, and afterwards altered by him to a much larger sum before it was passed into circulation, or had become a binding contract in the hands of a *bona fide holder*. It was held that the banker who paid the check for the larger amount had a right to retain against the drawer the full sum paid by him, because the check was drawn in so improper and careless a manner as to enable an agent of the drawer to practise a fraud on an innocent party. This decision rests on the principle that where one of two innocent parties is to bear a loss, it must fall on him who employed a dishonest agent and carelessly furnished him with the means of committing a fraud. The same principle was recognized by this court in the early case of Putnam v. Sullivan, 4 Mass. 45, where indorsers were held liable on a promissory note, which they had left in blank with their clerk, and who had permitted the note to be filled up and put in circulation for a purpose different from that for which it was intrusted to his possession. These are cases, where parties have been held liable on a negotiable check and note fraudulently filled up and put in circulation by their agents, to whom they were intrusted with the signatures in blank. But they rest on a very different principle from that applicable to notes and bills which have been fraudulently altered in material particulars by third persons, holding no relation of agency to the parties, and after they have been executed and delivered as binding contracts. In such cases, the parties to the note have a right to say that it was not the contract into which they entered.

Exceptions overruled.

BLISS v. McINTYRE et al.

18 Vt. 466. (1846)

Trespass *quare clausum fregit*. Plea, the general issue, and trial by jury, Redfield, J., presiding.

On trial it appeared, that the plaintiff, on the first day of May, 1844, was the owner of the premises described in his declaration, consisting of a clothier's shop, dwelling house and out buildings, and that on that day he conveyed them by deed to one Johnson, and delivered to him the possession; that Johnson continued to occupy the premises under the deed until the fourteenth day of August, 1844, when he re-conveyed the premises to the plaintiff and took from him a lease of the premises for the term of nine years, reserving a rent, and continued in possession of the premises, under the lease, until the twenty first day of October, 1844. The plaintiff claimed, that the lease, as executed, contained a clause securing to him the right of re-entry upon the premises, in case of non-performance by Johnson of certain stipulations in the lease, and that that clause had been erased by Johnson, without the knowledge or consent of the plaintiff. The erasure was apparent upon the lease; but it was claimed by the defendant, that it was made before the lease was executed.

Upon these facts the county court instructed the jury, that the plaintiff was not entitled to maintain this action; to which decision, the plaintiff excepted.

WILLIAMS, Ch. J. In this case the court decided, upon the evidence, that the plaintiff was not entitled to recover. It appears to us, that the case should have been submitted to the jury; and, if the facts were as claimed by the plaintiff, he was entitled to recover. There was apparent, on the lease executed by the plaintiff to Johnson, a material alteration and erasure, by which the estate of Johnson was enlarged. The right of the plaintiff to re-enter was erased, and the situation of the grantor and grantee was materially changed. If this alteration and erasure were made by Johnson, under whom the defendants acted, the plaintiff had a right to recover; and whether it was so altered by him is a question which should have been submitted to the jury.

The plaintiff claimed a right to re-enter, on being denied the rights secured to him by the stipulations in the lease. These rights were secured to him by that clause in the lease, which is erased. In this view, alone, it was important to have that fact passed upon by the jury.

But, moreover, if this erasure was made by Johnson, it destroyed

all his future rights under that lease. And although it might not divest an estate already vested, and might not have operated on his acts committed before the alteration was made (questions, however, which are not now to be decided) *in odium spoliatoris* he must be considered as having destroyed the evidence of his title fraudulently and thereby lost all his subsequent claim under and by virtue of the same, either to retain the possession, or preclude the plaintiff from entering on the premises leased.

The judgment of the county court is therefore reversed.

DOVER v. ROBINSON et al.

64 Me. 183. (1874)

BARROWS, J. Upon the testimony here reported the question seems to be whether the inhabitants of a town can maintain an action against the sureties upon a collector's bond originally given in the penal sum of twenty-five hundred dollars when said penal sum has been altered by the principal in the bond, since its delivery, with the knowledge and consent of the selectmen of the town, from twenty-five hundred to twenty-five thousand dollars, without the knowledge of the sureties, and in the absence of all proof of a subsequent ratification by them. The proposition that these are facts sufficient to sustain the sureties' plea that such altered bond is not their deed, would seem to admit of little doubt. It is not a case of spoliation by a stranger.

To sustain the present suit against the sureties we have a written obligation which has been vitiated as an instrument of evidence by the deliberate intentional act of the plaintiff's agents, an act done apparently to secure themselves from the blame which might attach to them for their carelessness in accepting an inadequate security, but an act which has effectually deprived the town for which they acted of any right of action against these sureties upon this bond, as if they had never executed any bond at all. It is not their deed. But there is another view which is equally fatal to the plaintiffs' case. The plaintiff town presents itself here in this very suit in the attitude of ratifying this act of their selectmen.

Plaintiffs have leave to discontinue as to the sureties.

McMURTREY, Admr. v. SPARKS.

71 Mo. App. 126. (1897)

BOND, J. This suit is upon the following note:

"$400. June 9th, 1895.

"Six months after date I promise to pay to the order of J. E. McMurtrey, administrator of the estate of J. P. McMurtrey, four hundred dollars, at eight per cent. This note given in lieu of one nearly debarred. Value received with interest at eight per cent per annum. WILLIAM SPARKS."

The answer averred that plaintiff with intent to make valid what he deemed invalid, had altered the date of note without defendant's knowledge or consent and hence the note was not executed by defendant. The cause was submitted to the court without a jury. There was an agreed statement of facts, to wit: "It is admitted by counsel that the note was originally dated on the ninth day of June, 1895, that the date was changed by plaintiff, the holder, to June 17, 1895, and then changed back again to its original date, June 9, 1895, and that the change was made by plaintiff for the reason that plaintiff thought the note was illegal, having been made upon Sunday; that the plaintiff was afterward informed that he was mistaken and he changed it back to the original date. It is further admitted that the change was made on the note without the knowledge or consent of the defendant, and after it had been signed by defendant and delivered." There was proof that the note in question was one given in consideration for one heretofore made by defendant to plaintiff's intestate, which was "nearly out of date." There was a verdict and judgment for defendant, from which plaintiff appealed.

The first point urged on this appeal is, that the changes in the date of the note shown in the agreed statement of facts did not avoid it as to defendant. The change of the date of a note is a material one, and when made by the payee without the consent of the maker, the note is no longer valid against the latter. Moore v. Hutchinson, 69 Mo. 429; Bank v. Fricke, 75 Mo. 178; Aubuchon v. McKnight, 1 Mo. 212; Wood v. Steele, 6 Wallace (U. S.) 80. A clear and comprehensive statement of the law on this subject is contained in the following language of Justice Swayne: "It is now settled in both English and American Jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of

the date, whether it hasten or delay the time of payment, has been uniformly held to be material."

Since the rule is that material alterations of notes and bills annul the obligations against unconsenting parties, it follows that their liability can only be restored by a new agreement with them. In other words, being released from the paper by one alteration thereof, they can not be rebound by another, made without their knowledge or consent. The point under review is therefore ruled against appellant.

It is, however, urged that the changes of the date of the note in question were not alterations, but mere spoliations, and do not therefore prevent a recovery on the original contract. A material change in a bill or note made by a person interested therein, is an alteration. Changes in such instruments by strangers or persons having no beneficial interest therein, are spoliations. Spoliations do not annul the rights and obligations of the parties to the contract. State v. McGonigle, 101 Mo. 366, 367. In the case at bar the plaintiff administrator either had no right to take the note, or he had the right to fix its date, amount, rate of interest and other essential elements. He did take the note payable to himself, and brings this action to collect it. As payee and party to the note and plaintiff in a suit to enforce it, he is concluded from averring a want of interest in its proceeds. A party with whom a contract is made and who seeks to enforce its obligations, can not in such proceeding aver his want of interest in the contract or its subject matter. The administrator of a decedent is the title holder of the personal assets of the estate for the purposes of administration, and has a pecuniary interest in them for the commission allowed him by law. The plaintiff in this case was not a stranger to the note, and the first change made by him in its date was a material alteration, not a spoliation, which avoided the instrument against the maker. The judgment in this case is affirmed. Judge BIGGS concurs; Judge BLAND not sitting.

GREEN v. SNEED.

101 Ala. 205. (1892)

John H. Sneed sued Andrew H. Green in detinue for the possession of certain personal property, to which he claimed title under and by virtue of a mortgage executed by the defendant, the law day of which

had passed. The defendant's testimony showed that the plaintiff had filled a blank in the mortgage by inserting a larger amount than that agreed on by the parties and contemplated by the defendant when he authorized the plaintiff to fill in the blank. On the trial of the cause there was a verdict for the defendant; but on motion of the plaintiff for a new trial, the court set aside the judgment, and granted a new trial, on the ground that the verdict was contrary to the evidence. To the ruling of the court annulling the judgment and granting a new trial the defendant duly excepted, and now brings this appeal, and assigns such ruling as error.

MCCLELLAN, J. The evidence is free from conflict that Sneed was authorized to fill the blank left in the mortgage executed by Green to him, by inserting therein the amount of the former's debt against the latter, after deducting therefrom the proceeds of certain two bales of cotton, and adding thereto the costs of a former suit between the parties. There is conflict in the testimony as to whether the mortgagee also had authority to add to the debt costs and attorney's fees incurred by him in the former suit, and insert the aggregate of all these items in the blank space left in the instrument. For the purposes of this appeal, however, it will be conceded that the mortgagee was authorized to include and insert as a part of the amount intended to be secured the sum paid his attorney for services in the previous litigation. A satisfying preponderance of the evidence fixes the amount of the debt balance at one hundred and twenty-five dollars ($125). It was shown without conflict that the attorney's fee in question was $18, and the costs of the former suit amounted to $8.65. The total of these sums is one hundred, fifty-one dollars and sixty-five cents. The balance of the debt which the mortgagee *claimed* to be due was $138.24. Adding to this the attorney's fee and court costs, the total is $164.89. No phase or tendency of the evidence shows a greater total than this, and this sum, $164.89, on the aspects of the testimony most favorable to the plaintiff, marks the extremest limit of the amount he was authorized to insert in the instrument. The amount actually inserted by or for him was $167.10; $2.21 in excess of his authority, if the evidence in his own behalf is to be taken as true, and $15.45 in excess of the amount which, according to a preponderance of the testimony, he was authorized to insert in the blank.

The general proposition that any material alteration of an instrument after its execution, without the maker's consent, avoids it and discharges him from all obligation depending upon it is not controverted in this case. Montgomery v. Crossthwait, 90 Ala. 334, 6 So.

Rep. 82. Nor can it be doubted in principle or upon authority that a material and, as between the original parties to the instrument, a vitiation alteration may consist in the filling of a blank, which the promisee is authorized to fill in a certain way, by the insertion therein of matter not covered by the authorization. 1 Am. & Eng. Encyc. of Law 518; Toomer v. Rutland, 57 Ala. 379. And as any change of the amount intended to be evidenced by a writing, whereby it becomes nominally a promise to pay either a greater or less sum than that originally expressed is a material, and, therefore, vitiating alteration (1 Am. & Eng. Encyc. of Law, 508), so, in principle, where the amount is left blank and the promisee is authorized to insert a given sum, or the true aggregate of several specified items, the respective amounts of which are fixed but not at the time known to the parties, and he inserts a different amount, as here, in excess of the true aggregate of all the items intended to be embraced, and the like vitiation consequences must ensue.

The court below confined the application of these principles to cases in which the alteration is made with a fraudulent intent, and, finding no such intent to have actuated the plaintiff in this instance, held that the mortgage was a valid security for the amount really due, notwithstanding a different and excessive amount had been inserted in it. The distinction is not well taken. The question of intent is not involved. As is well said by counsel: "The motive with which the change is made, or the unauthorized filling of the blank is done, is not material. It is not because the thing done is actual fraud, but because a contrary rule would open too great a door for fraud," and because, we may add, that the alteration changes the legal identity of the paper and causes it to speak a language differing in legal effect from that which it originally spoke, a result which would ensue however pure the intent with which the alteration was made, that the law holds the instrument, as between the original parties and those nominally acquiring rights under it with notice of the alteration, to be null and void for all purposes. 1 Am. & Eng. Encyc. of Law, 518, 520; Glover v. Robbins, 49 Ala. 219; Toomer v. Rutland, 57 Ala. 379; Montgomery v. Crossthwait, 90 Ala. 573.

Where the alteration or unauthorized filling of blanks is free from all covinous intent, the result of an honest mistake or miscalculation, it may be that the promisee can recover on the original consideration: he certainly could not do even this if he made or consented to the change for any fraudulent purposes—1 Am. & Eng. Encyc. of Law, 526; White v. Haas, 32 Ala. 430—but here the action is not on the

original consideration for which the mortgage was executed, but the right of recovery, the title asserted by the plaintiff in this action of detinue, depends upon the validity of the paper itself, which in legal contemplation ceased to be the instrument which the defendant executed the moment it was altered as shown by the uncontroverted evidence, and its emasculation is none the less complete because of the absence of evil intent on the part of the plaintiff in committing the act which destroyed it.

The evidence not only authorized the jury to find for the defendant, but it showed, without conflict or room for adverse inference, that the muniment of title upon which the plaintiff relied for recovery was utterly infirm and invalid, and hence the jury could not have found other than they did under the law of the case.

It is clear that the trial court erred in setting aside the verdict and granting a new trial. The judgment to that effect is reversed and annulled, the motion for new trial is overruled and denied, and the verdict and judgment for defendant as returned and rendered in the court below is left in full force.

Reversed and remanded.

ANNA AMES v. ANNA M. BROWN & HUSBAND.

22 Minn. 257. (1875)

Plaintiff brought this action in June, 1874, in the Court of Common Pleas of Hennepin County, praying that a certain mortgage from herself to one Spencer, together with the sheriff's certificate of sale to Spencer, on foreclosure of the mortgage, and the assignment of such certificate from Spencer to the defendant, Anna Maria Brown, might be adjudged null and void, that the sale be set aside, and the mortgage, certificate and assignment might be cancelled of record as a cloud upon her title. The ground on which this relief was asked was that the number of the section in the description of premises contained in the mortgage was inserted after it had been executed and delivered by plaintiff.

CORNELL, J. The modern rule is well settled that an alteration of a deed or written instrument, even though in a material part, by a mere stranger, without the privity, knowledge, or consent of the party interested, will not render it void. Waring v. Smyth, 2 Barb. Ch. 119,

and note. In this case no privity existed between Spencer, the mortgagee, and S. C. Gale, who made the alteration for the sole purpose of conforming the mortgage to the intention of the parties, and to correct a mistake which he, as the scrivener of the mortgagor, had committed in drawing it, and which he innocently supposed he had the right to do. 1 Greenl. Ev. sec. 189. That such alteration was never made by the procurement, consent, or knowledge of Spencer is fully established as a fact by the finding of the court. Hence what, in the absence of such finding, would be the presumption growing out of the relation of principal and agent between Spencer and Gale & Co., of which firm S. C. Gale was a member, is a matter of no importance. But the special character of the agency of Gale & Co. gave them no authority to tamper with the security of their principal, or to destroy it, much less could any such authority be claimed in favor of any individual member of the firm. Their custody of the paper, for a specific purpose, cannot be deemed such a possession by the principal as would charge him with any knowledge of, and presumed assent to, their unauthorized and illegal acts, and make him responsible for their consequences. U. S. v. Hatch, 1 Paine (C. Ct.), 336. It follows that S. C. Gale must be regarded as a stranger, whose unauthorized act in altering the mortgage in no way affected the legal or equitable rights of the mortgagee or his assignees.

Judgment affirmed.

FULLER v. GREEN.

64 Wis. 159. (1885)

This action was commenced to recover the amount of a promissory note given by the respondent to one George H. Rice. The note had been transferred by Rice to one A. J. Woodward, in whose name the action was originally commenced. Woodward died after the action was commenced, and the present appellants, his executors, were substituted as plaintiffs.

There was no dispute as to the fact that the defendant executed the note and delivered it to Rice. On the trial in the court below two defenses were relied upon to defeat the action: (1) That after the note had been delivered by the defendant to Rice. it had been altered without his knowledge or consent by adding thereto the name of N. Fred-

ericks as an attesting witness to the note; and, (2) that the note was fraudulently obtained from the defendant without any consideration therefor.

Upon the first point the evidence tended strongly to show that when the note was executed and delivered by the defendant to Rice, N. Fredericks' name was not placed on the same as an attesting witness, but that he was present when the note was made and delivered by the defendant to Rice. When the note was produced in evidence. Fredericks' name was written thereon as an attesting witness; when it was placed there does not appear. The proof shows that it was done without the knowledge or consent of the defendant.

Upon the first point, as to the alteration of the note, the learned circuit judge instructed the jury as follows:

"It is claimed by the defendant that the note in suit has been altered since it was made and executed by the defendant, by one N. Fredericks affixing his name as a witness to the same without the consent or knowledge of the defendant, and that the note in consequence is void.

"Upon this point I instruct you that, if you find and believe from the evidence that George H. Rice, the payee of this note, or any other holder of the same, did, without the knowledge, consent, or request of the defendant, fraudulently, and with a view to gain some improper advantage, procure Mr. N. Fredericks to affix his name to the note in question as a subscribing witness to the same after the same was made, executed, and delivered to Rice by the defendant, then the affixing of such name of Fredericks to the note, under the circumstances, constitutes a material alteration of the same—rendering it void in Rice's hands, as well as in the hands of the plaintiff, and your verdict must be for the defendant."

TAYLOR, J. The old rule of law in England that any alteration, whether material or immaterial, and whether made by a party interested in the contract or by a stranger, rendered the contract void, was long since abandoned; and the reasonable rule has now become firmly established that an alteration of a contract which will render it void must be made by a party thereto or with his knowledge or consent; and, further, the alteration must be material; that is, the alteration must in some way change the legal effect thereof as between the parties thereto. The insertion or addition of words in or to a contract, or the erasing of words therefrom, which do not change the legal effect thereof in any respect, does not render the contract void, and is an immaterial alteration. Williams v. Starr, 5 Wis. 534;

Schwalm v. McIntyre, 17 Wis. 240; Matteson v. Ellsworth, 33 Wis. 488; North v. Henneberry, 44 Wis. 306; Krouskop v. Shontz, 51 Wis. 204, 206; Palmer v. Largent, 5 Neb. 223; Aldous v. Cornwall, 9 Best & S. 607; Marson v. Petit, 1 Camp. 82; Trapp v. Spearman, 3 Esp. 57; Sanderson v. Symonds, 1 Brod. & B. 426; S. C., 4 Moore 42; Catton v. Simpson, 8 Ad. & El. 136; Gardner v. Walsh, 5 El. & Bl. 83; Truett v. Wainwright, 4 Gilman 411; 2 Parsons on Cont. (6th ed.) 718-720; Granite R. Co. v. Bacon, 15 Pick. 239; Langdon v. Paul, 20 Vt. 217; Huntington v. Finch, 3 Ohio St. 445; Nichols v. Johnson, 10 Conn. 192; Humphreys v. Crane, 5 Cal. 173.

The affixing of the name of Fredericks as an attesting witness to the note in question does not change the liability of the maker thereof in any respect. It has no effect in extending his liability under the statute of limitations, nor does it under our laws facilitate or interfere in any way with its proof. Under our law the production of the note proves its execution, unless the signature be first denied under oath by the maker. When there is no dispute as to the genuineness of the maker's signature, and therefore no necessity for the person claiming under it making proof of its execution, the fact that the note has or has not an attesting witness is wholly immaterial.

If the alteration be wholly immaterial, and in no way changes the liability of the maker of the note, it seems to us wholly immaterial with what intent such alteration was in fact made.

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

FISHER v. KING.

153 Pa. St. 3. (1893)

DEAN, J. On January 18, 1890, judgment was entered in this case on a single bill, dated July 1, 1889, with warrant of attorney in the sum of seven hundred and fifty dollars ($750), payable two years after date with interest at five per cent. The obligor is Henry King, this appellant; the obligee Frederick Fisher, appellee who assigned the judgment to Bromley & Burns as collateral security for a loan of two hundred and twenty-five dollars ($225).

As to the second averment, that there was a material alteration of the instrument after delivery, the evidence shows only the parties

to it were present when it was sealed and delivered by King to Fisher; Fisher then left the house with the bill and called upon Robert T. King, brother of defendant, who wrote his name in the place where should appear the name of a witness. If this was willfully done, with the knowledge and consent of Fisher, even though no additional liability was thereby imposed on the obligor, it avoided the instrument. The application of this rule does not, in case of willful alteration, depend on the injury done in the particular case, but as is said in Neff v. Horner, 63 Pa. 330, its true ground is public policy, to insure the protection of instruments against fraud and substitution. And it has been held to be a material alteration to cause the name of a person to be placed on a note as a witness who was in no respect a witness to any part of the transaction. Homer v. Wallis, 11 Mass. 312. If there be a material alteration by the payee, after delivery, willfully, however innocent the intention, or however slight the prejudice to the maker, the instrument is avoided.

If there was no willful alteration, there is no reason for enforcing the rule, that the alteration shall avoid the instrument. The purpose of the rule is to take away the motive for alteration by a forfeiture, a penalty, which punishes the offender and deters others. But to inflict such a severe penalty for the blunder of an ignorant man accomplishes not the purpose of the law; no guilt is reached, for none exists; other blunders are not deterred, for a forfeiture does not dispel ignorance. We are, therefore, of the opinion that under the facts of this case the law does not call for a forfeiture of the obligation.

GLEASON v. HAMILTON.

138 N. Y. 353. (1893)

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made May 13, 1892, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, and affirmed an order denying a motion for a new trial.

This was an action for the foreclosure of a mortgage executed by defendant to plaintiff.

PECKHAM, J. We ought not to reverse it and send the case back

for a new trial when there is sufficient evidence, wholly uncontradicted and perfectly credible, to prove beyond any doubt that the plaintiff ought to recover. The plaintiff was wholly ignorant of the alteration attempted to be made in the mortgage and so remained until after the commencement of this action. The action itself is brought to foreclose the mortgage for non-payment of paper which confessedly it was originally given to secure. The attorney, who wrote in the addition to the mortgage as it originally was executed, had no power as agent of the plaintiff to make any alteration in the instrument by which its validity should be avoided. While the high character of the attorney who directed the addition might render it entirely plain that there was no intention of making any fraudulent alteration, and while the evidence seems to pretty clearly show there was not in fact the slightest wrongful intent in directing the alteration, and that it was done for the purpose of thereafter securing the assent of the defendant to the alteration, yet no such assent was secured and this act of the attorney for the plaintiff cannot properly, as we think, operate as if it had been an alteration made in a material part of the mortgage by the plaintiff himself, or by his attorney or agent with his knowledge or by his authority expressed or implied.

The act of the attorney did not and ought not to bind the plaintiff in this case.

Many cases have arisen since the decision of Pigot's Case (11 Coke 47), where it was held that a material alteration made by a stranger to a deed, and without the privity of the obligee, did, nevertheless, invalidate the instrument. As late as the years 1843, and 1844, this decision was treated with respect by the English courts. (Davidson v. Cooper, 11 M. & W. 778, 798; S. C. in Exchequer Chamber, 13 id. 342.)

But there has been since that period a departure from this rule even in England (see Aldrous v. Cornwell, 3 Q. B. (L. R.) 573, A. D. 1868) while in our state the cases referred to in the opinion delivered in the General Term in this case, and those cited in the briefs of counsel before this court, show that when an alteration is not made by a party to the instrument and in a material matter, the alteration is of no effect and the original validity of the instrument remains. (Casoni v. Jerome, 58 N. Y. 315, 321,; Smith v. Kidd, 68 id. 130, 141; Martin v. Ins. Co., 101 id. 498; Town of Solon v. Bank, 114 id. 134.)

In Vermont the same rule obtains. (Bigelow v. Stilphen, 35 Vt. 521.)

See, also, in other states. (Robertson v. Hay, 91 Penn. St. 242; Hunt v. Gray, 35 N. J. Law 227; Nickerson v. Sweet, 135 Mass. 514; Brooks v. Allen, 62 Ind. 401.)

Upon the ground that the plaintiff was not in any manner responsible for the attempt, unknown to him, to enlarge the liability of the mortgagor by the proposed alteration, and because the plaintiff seeks only to enforce the mortgage as it was originally executed, we affirm the judgment appealed from.

All concur, except ANDREWS, Ch. J., not voting.

Judgment affirmed.

DAVIS, STEELE & CO. v. EPPLER et al.

38 Kan. 629. (1888)

Action to recover upon a promissory note.

HOLT, C. The most serious question in this case is, whether the writing of the words "Waive notice and protest" on the back of the note before maturity, over the names of Farrell and Eppler, was such an alteration as to relieve the defendant Eppler of his liability as indorser. It is proven that Eppler never consented to such addition; on the other hand, it is also well established by the evidence that such writing was not made with the intention of creating any greater liability on the part of Eppler and it is beyond question that the indorsement was a substantial change in the contract between Eppler and plaintiffs; it changed his contingent liability to an absolute one. (Dan. Neg. Ins., sec. 1390; Farmer v. Rand, 14 Me. 225; Andrews, Adm'x v. Sims, Adm'r, 33 Ark. 771.)

We believe it would be a dangerous rule to allow written contracts, more especially negotiable paper, to be altered without the consent of the maker, or the parties who are bound by the indorsement. It is intended that such instrument shall pass into the hands of those who may become interested in them, without addition or alteration, and without the fear that they may have been altered. The facilities for making alterations are numerous, and the difficulty of proving them great; all means should be employed to impress a sense of

their inviolability upon the minds of those who have them in their possession.

It is the policy of the law to allow no tampering with written instruments. The holder of a note has no right to alter it without the consent of all the parties interested, and such unwarranted alteration should make it null in his hands, no matter how pure his motives may have been in making the alteration. (Bank of Springfield v. Fricke, 75 Mo. 178; Moore v. Hutchinson, 69 id. 429; Neff v. Horner, 63 Pa. St. 327; Fraker v. Cullum, 21 Kan. 556; Horn v. Newton City Bank, 32 id. 518.)

For the reasons given herein, we recommend that the judgment of the court below be affirmed.

By the court it is so ordered.

All the Justices concurring.

CROSWELL v. LABREE.

81 Me. 44. (1888)

This was an action on a promissory note, of which the following is a copy:

"$85.00 Monson, Aug. 8th, 1883.

One year after date I promise to pay to the order of J. G. Timberlake or bearer Eighty-five no-100 dollars at my house with interest, value received.

I. D. LABREE."

The note was written by filling out a printed blank. The defense was that the words "or bearer" had been written in after the note had been completed, signed and delivered by the maker, and without his knowledge or consent. The presiding justice instructed the jury, that, "to constitute a defense by this alleged alteration, you must be satisfied that the words 'or bearer' were written in by some person after the note was made and delivered, for a fraudulent purpose, with an improper motive, for the purpose of changing the character of the contract and changing the obligation of the maker; because if the words were written in by mistake, without the improper motive, without the fraudulent intent, they may be disregarded, and they would not affect the contract at all."

PETERS, C. J. The note in controversy contains the promise of

the defendant to pay, "to the order of" J. G. Timberlake "or bearer," a sum of money, and was indorsed by the payee to the plaintiff. The defense at the trial was an alleged unauthorized alteration of the note by inserting it in the words "or bearer."

The judge at the trial ruled that, if the alteration, though unauthorized, was made innocently, without any fraudulent or improper motive, it would not avoid the note. That was correct and is well borne out by the principle established in Milbery v. Storer, 75 Me. 69.

The further instruction was given that the burden of proof was on the defendant (the maker) to satisfy the jury that the note was improperly altered. We are of opinion that this instruction was not correct. The act of alteration was apparently fraudulent. A wrongful act naturally indicates a wrongful intent, and requires explanation to excuse it. The holder of a note must show that an alteration proved or admitted was made innocently. Otherwise it would follow that, in the case of the most glaring forgeries by alteration of negotiable paper, the party sought to be charged thereon must explain the motive of the forger. In the case cited it is declared that alteration is *prima facie* evidence of fraudulent intent, but that it may be rebutted and disproved.

The alteration in the present instance was a material one. It undertook to foist a contract on the maker not made by him. It changed the obligation as an instrument of evidence. Chadwick v. Eastman, 53 Mo. 12; Hewins v. Cargill, 67 Me. 554. It is held in Dodge v. Haskell, 69 Me. 429, that the burden is on the plaintiff to explain any apparent material alteration of a note, so far as it does not sufficiently explain itself to the minds of the jury.

Exceptions sustained.

SEWING MACHINE CO. v. DAKIN.

86 Mich. 581. (1891)

CHAMPLIN, C. J. This is an action on a bond given by Milo H. Dakin as principal, and Aaron T. Bliss and Anthony Byrne as sureties, to the plaintiff, to secure any indebtedness incurred by Dakin to the plaintiff while acting as its agent in selling sewing-machines.

The only questions presented by the record are:

1. Was the insertion of the words "attorney's fees" a material alteration, if inserted after the bond was executed?

2. If inserted by Van Ness after it was executed, and before it was forwarded by him to the plaintiff for acceptance or rejection, did it render the bond invalid in the hands of the plaintiff?

Clearly the alteration by the insertion of the words "attorney's fees" was immaterial. An alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties thereto. 1 Amer. & Eng. Cyc. Law, 505.

The penalty of this bond is $1,000, no more and no less; and no recovery can exceed that amount. Bishop v. Freeman, 42 Mich. 533; Odd Fellows v. Morrison, id. 523; Spencer v. Perry, 18 id. 394. The damages including the interest, where it is proper to allow it to be assessed under the conditions, cannot exceed the penalty; and if they equal the penalty, they can only draw interest from the date of judgment. In this case, as in the other cases under the statute, the recovery and judgment would be for the penalty of the bond, and the further judgment that the plaintiff have execution for the damages assessed. The promise to pay ten per cent. attorney's fees is no part of the penalty of the bond, and by no possibility can it affect the judgment to be rendered upon the bond, nor the amount of damages to be assessed.

Second. If any alteration was made after the execution of the bond, it was done by Van Ness, and although he was the agent of the plaintiff, and received and forwarded the bond in question to the plaintiff for its approval or rejection, yet there is no testimony in this record tending to show that he was expressly or impliedly authorized to make any alteration in the bond.

The rule of law is that, when an alteration is made by a third party, it is an act of spoliation, and the alteration, although material, cannot invalidate the written instrument; and when the spoliation is done by the agent of one of the parties, it will not avoid the contract if the agent had no express or implied authority to do it. 1 Am. & Eng. Cyc. Law, 505; Van Brunt v. Eoff, 35 Barb. 501; Collins v. Makepeace, 13 Ind. 448; Hunt v. Gray, 35 N. J. Law, 227; Bigelow v. Stilphen, 35 Vt. 521; Miller v. Reed, 3 Brant, Cas. 51; S. C., 27 Penn. St. 244; Terry v. Hazlewood, 1 Duv. 104. The declaration counts upon the bond as being in a penalty of $1,000, and assigns breaches of the conditions. It follows that the bond

would be a valid instrument in the hands of the plaintiff for what it was before the alteration was made.

The errors assigned must be overruled, and the judgment affirmed, with costs of both courts.

MERRITT v. BOYDEN & SON.

191 Ill. 136. (1901)

This is an action of assumpsit, brought by the appellees against the appellant, Merritt, and one L. Silverman on a note made by Silverman and Merritt, which note was payable to their own order and endorsed by them in blank. The declaration contains a special count on the note, and the common counts. The following is a copy of the instrument sued upon:

"$1300.00 Kewanee, Ill. Oct. 4, 1897.

"One year after date I promise to pay to the order of ourselves thirteen hundred dollars at Kewanee, Ill. Value received, with interest at the rate of seven per cent per annum.

Endorsed:

L. SILVERMAN. L. SILVERMAN,
H. CLAY MERRITT. H. CLAY MERRITT."

Default was entered against Silverman. Merritt pleaded the general issue, and denial of the execution of the note sued on, sworn to by him. The jury rendered a verdict in favor of the plaintiffs for the sum of $1519.92, upon which judgment was entered on March 27, 1900. An appeal from this judgment was taken to the Appellate Court, and it has there been affirmed. The present appeal is from such judgment of affirmance.

MAGRUDER, J. When the note, sued upon in this case, was signed and endorsed by the appellant, Merritt, and L. Silverman, Silverman took the note, and through his action or that of others acting for him, the note was sold and delivered to the appellees, Boyden & Son. The proof tends to show—and such proof is substantially undisputed—that the appellees purchased the note in good faith without notice of any defect in it, and paid therefor the sum of $1300.00.

The defense, made by the appellant in the trial court, was based upon two theories: First, that the words, "one hundred" were written in the body of the note before the word "dollars," and that the

word "one," was in some way erased, or taken out of the note, and the word "thirteen" was written in its place before the word "hundred;" second, that, when the note was signed and endorsed by the appellant the word "one," was not in the body of the note, but that there was a blank space before the word, "hundred," and that in this blank space and before the word "hundred," the word "thirteen," was written. Whether the note was altered in the one or the other of the modes thus stated, the proof tends to show, and is substantially undisputed that the change was not made by the appellant, Merritt, or by any one authorized by him to make it, and that he knew nothing about the change, and had no intimation of it, until about the time the note fell due.

First—If the note was altered by the erasure of the word "one" in the body of it and the insertion of the word "thirteen" in the place of the word "one" before the word "hundred," then the alteration amounted to a forgery, and the appellant is not liable upon the note, even though the appellees were *bona fide* purchasers thereof for value without notice or knowledge of the change. If the amount named in a note is raised by erasing what is written such alteration is a material one, and the note is thereby vitiated, so as to become void. When a note is changed materially either by a payee or transferee, not only is it vitiated and destroyed in the hands of the party responsible for the alteration, but no recovery can be had upon it against the maker by a person into whose hands it has come after the change was made, even though the latter be a *bona fide* endorsee for value without notice of the alteration. (2 Am. & Eng. Encyc. Law, 2nd ed. pp. 193, 255, 257; 3 Randolph on Commercial Paper, 2nd ed. sec. 1754.) Where a note is complete at the time when it is signed by the maker, its subsequent alteration by raising the amount thereof through obliteration of the same by the use of any chemical process, or other ingenious device, without the knowledge or consent of the maker, will discharge him from liability upon the note. (Burrows v. Klunk, 70 Md. 460.) "When a negotiable instrument is materially altered, no recovery can be had thereon against any one, who became a party thereto prior to the alteration, even though he be a *bona fide* holder without notice." (4 Am. & Eng. Encyc. of Law, 2nd ed. p. 332; Angle v. Northwestern Mutual Life Ins. Co., 92 U. W. 340). In Burwell v. Orr, 84 Ill. 465, we said: "The alteration of the instrument, on which the suit was brought was material, and, under the circumstances, must be presumed to have been made by or with the consent of the holder. If so, the

whole instrument, by the alteration, became *ipso facto* void. No subsequent indorsement even to a *bona fide* purchaser for value, could give validity to a void instrument." (Pahlman v. Taylor, 75 Ill. 629.) The rule seems to be well settled that, in case of a material alteration of a note, it becomes invalid even in the hands of a subsequent endorsee for value. (Wade v. Withington, 1 Allen 561; Commonwealth v. Emigrant Industrial Savings Bank, 98 Mass. 17.)

The trial court, in instructing the jury upon the trial below announced the law in regard to the effect of a material alteration, as it is above stated.

Judgment affirmed.

WILLARD v. OSTRANDER.

51 Kan. 481. (1893)

Action by Ostrander against Willard for conversion. Judgment for plaintiff.

ALLEN, J. This action was brought by the defendant in error, as plaintiff below, to recover the value of 1,500 Merino sheep which he alleges he owned, and the defendant took and converted to his own use. The defendant admitted the taking of the sheep, but justified the act as having been done by virtue of a chattel mortgage given by the plaintiff to him on the 2nd day of September, 1885, on the sheep in controversy, to secure the sum of $3,850.50, according to the terms of four promissory notes. To this answer the plaintiff replied, denying the execution of the mortgage as set out in defendant's answer, but admitting that he executed a chattel mortgage on the same sheep, and alleging that a material change had been made therein by the defendant without the consent of the plaintiff, by inserting the word "wool"; also alleging that the sheep mortgaged were purchased from the defendant, and the mortgage given to secure the purchase price; that said sheep were warranted to be sound, healthy and free from disease; that they were in fact diseased, having a contagious disease commonly known as "mange," "scab," or "itch;" that various damages had been sustained by the plaintiff by reason of such disease; that the consideration of such notes had failed.

Much is said in the briefs, and the point was vigorously pressed on

the oral arguments, as to the materiality of the word "wool" in the mortgage. Plaintiff in error contends that a mortgage of the sheep necessarily covers their wool. The question is not free from difficulty. (See Jones, Ch. Mort., secs. 149-151, and cases therein cited; Bryant v. Pennell, 61 Me. 108.) Without attempting to carefully review all the authorities, we think, as between the parties to the action, a mortgage on the sheep would include the "wool," but that after the "wool" was clipped, if sold to a purchaser for value without notice, he would get a title free from the lien of the mortgage. If this conclusion be correct, the insertion of the word "wool" would be a material alteration. If the mortgage was in fact altered after its execution, the alteration must have been by the mortgagee, or by his direction, to impair its validity; and it will not be presumed that an agent entrusted with the possession of the security was directed by the mortgagee to make such an alteration, but that fact must be shown by proof. (Langenberger v. Kroeger, 48 Cal. 147; 17 Am. Rep. 418). Some other questions are urged on our consideration, but as they are not likely to arise on another trial, we do not feel called on to specially mention them.

For the errors of the court in instructing the jury, the judgment must be reversed and a new trial ordered.

DERBY v. THRALL.

44 Vt. 413. (1872)

Assumpsit upon common counts. Plea, the general issue.

Upon the trial, it appeared that one Wilson had arranged with the plaintiff for the purchase of a rifle, in part payment for which he was to give a note for $22, with surety, and that Wilson procured the defendant to become such surety by agreeing that in the purchase of the rifle he should act as the agent of the defendant, and the rifle be the property of the defendant until the note should be paid. That the plaintiff was commonly called Frank, when called by given name. That Wilson procured a note to be drawn, dated April 23, 1869, for $22, payable in the month of October, then next, to Franklin Derby, supposing that to be the plaintiff's name, and the defendant signed the note as surety. That Wilson took the note to the plaintiff and the plaintiff noticed that the name of the payee was Franklin instead

of Francis E. Derby, and that Wilson then consented that the plaintiff might alter the name of the payee from Franklin Derby to Francis E. Derby, and the plaintiff did so alter it and took it in payment for the rifle, and that the defendant did not know of the alteration. The plaintiff offered the note in evidence, in connection with the proof of these facts. The defendant objected. The court overruled the objection and admitted the note in evidence, and upon these facts rendered judgment for the plaintiff for the amount of the note with interest. To each of these decisions, the defendant excepted.

PIERPOINT, Ch. J. It appeared from the exceptions that the note on which the plaintiff seeks to recover, was given for a rifle purchased by one Wilson of the plaintiff; that the defendant signed the note to the plaintiff, as surety for said Wilson; that Wilson procured the note to be drawn, and had it made payable to Franklin Derby, supposing that to be the plaintiff's name, as he was commonly called Frank. After the note had been signed by the said Wilson and the defendant, Wilson took it to the plaintiff, who noticed that it was payable to Franklin instead of Francis E. Derby, the plaintiff's name. Wilson then consented that the plaintiff should alter the name of the payee from Franklin to Francis E., and the plaintiff did so without the knowledge of this defendant.

The defendant now claims that such alteration of the note, without his consent, invalidates the instrument as to him, and discharges his liability. Whether it is to have such effect depends upon the nature of the alteration. Was it a material or an immaterial alteration? The alteration having been made by a party to the note if it is material it invalidates it, otherwise not.

It appears from the case that the plaintiff is the person to whom the note was given for property purchased of him, and this was understood by all the parties. This defendant knew, when he signed the note, what it was given for, and to whom it was intended to be made payable. He intended to sign a note payable to the plaintiff, and supposed he had done so. It turned out that Wilson had mistaken the given name of the plaintiff, and he consented that the plaintiff should make the alteration so as to make the note just what Wilson and the defendant supposed it was when they executed it. The change made no alteration in the liability or obligation of the makers. It neither enlarged, diminished, or varied that obligation. There was no change in the party to whom the obligation was assumed. The only effect of the alteration was to correctly describe the party to whom the promise was in fact understandingly made.

In the second volume of Parson on Notes and Bills, p. 560, it is said, "Adding the names in full of a firm to a bill drawn by them in the firm name, has been held no alteration, as being in effect only adding the Christian names of the drawees, whose surnames had been affixed to the bill before acceptance. So if the surname of the payee be interlined subsequent to the delivery, and it be proved that the note was originally given to this payee, the alteration is immaterial. So where a note made payable to a partnership under one name is endorsed by a surety, and afterwards altered by the maker and payee, without the knowledge of the surety, so as to be to the same firm under another name, the alteration is immaterial and does not discharge the surety." And various authorities are cited in support of these propositions, and the same author after a full examination of the cases, draws therefrom the following conclusion: "Wherever neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, the alteration is immaterial."

Applying these principles to the case before us, it is very clear that the judgment of the county court was right, and must be

Affirmed.

HAGAN v. MERCHANT'S & BANKER'S INS. CO.

81 Iowa 321. (1890)

Action upon a policy of insurance against loss by fire. The petition alleges the issuing of the policy, the loss of the property by fire, the value thereof, and notice and proof of loss within sixty days.

GIVEN, J. On the trial, plaintiff offered in evidence the policy, and copy of application attached, to which defendant objected, on the ground that it was apparent on the face of the instruments that they had been changed; wherefore the burden was on plaintiff to account for the change before he could introduce the instruments in evidence, and also upon the ground that plaintiff confessed the change in his reply, and had not offered evidence tending to avoid it. This objection was overruled. The defendant asked an instruction to the effect that, if the jury found that there was ground for suspicion on the face of the instruments that the policy had been altered as alleged, then the burden was upon the party offering it in evidence to show "when such alleged alteration was performed, by whom, and the intent with

which done." This instruction was refused, and one given that "the burden of establishing that the words were added to one or both of the places alleged after delivery of the policy rests upon the defendant. The overruling of said objection, the refusal to instruct as asked, and the instruction given, are assigned as error.

The books are full of diverse decisions as to whether, on the production of a written instrument, which obviously has been altered, it is incumbent upon the party offering it in evidence to explain its appearance. Some hold that an alteration apparent on the face of the writing raises no presumption either way; some that it raises a presumption against the writing, and, therefore, requires some explanation to make it admissible; others hold that it raises such presumption only when the apparent alteration is suspicious; and yet others, that it is presumed, in the absence of explanation, that the alteration had been made before delivery. The authorities are so numerous that we refrain from citing any, but refer to the American and English Encyclopedia of Law under "Alteration of instruments," where many of the authorities sustaining these different views are cited. This question was incidentally noticed, but not passed upon, in Jones v. Ireland, 4 Iowa 69; Ault v. Fleming, 7 Iowa 143; Wilson v. Harris, 35 Iowa 507; and Wing v. Stewart, 68 Iowa 13. These cases were disposed of upon other grounds, and the question before us has never been directly passed upon by this court. The issues involved in this defense are whether the policy was altered as alleged, and, if so, whether after delivery to plaintiff and without authority of the defendant. In Jones v. Ireland, *supra,* it was held to be a question of fact for the jury whether there had been an alteration as alleged. The instrument was certainly competent evidence as bearing upon this question, and was therefore, proper to go to the jury, but the contention is whether the plaintiff was entitled to offer it without explanatory proofs.

If the appearance of the instrument or other testimony tended to support the charge of alteration, it was the duty of the court to submit the issue to the jury; but if the instrument or other proofs did not so tend, then the issue should be withheld, as in any other case where there is no testimony tending to support the allegation. No complaint is made of the action of the court in submitting the issue, and we may assume, therefore, that the appearance of the instrument does tend to support the charge of alteration. The questions as to whether there were alterations, and, if so, whether fraudulent, were fairly before the jury, and the instruments were competent evidence upon those issues. Question is made whether it was necessary for the plaintiff to offer the

policy in support of his action. We think upon the pleadings it was not. The execution of the paper was not denied only in the sense that it was not the policy issued by the defendant, "for that the same has been changed and altered, without their knowledge or consent, since its delivery." This is not such a denial of the execution of the instrument as is contemplated in section 2730 of the revised Code. It is contended that the plaintiff, in his reply, confessed the alteration and pleaded in avoidance that it was altered before delivery. The reply will not admit of such construction. It expressly denies alteration, and, in the sentence where it is claimed an avoidance is pleaded, it is said that plaintiff does not admit that any change was made. If this question rested upon pleadings alone, we would say, under the general rule, that the burden was upon the defendant to establish his allegations that the instruments were altered after delivery, and without its authority. We think there was no prejudicial error in admitting the instruments over defendant's objections; for, if they had not been introduced by the plaintiff, they certainly would have been introduced by the defendant in support of its defense of alteration.

Our conclusion is, upon an examination of the whole case, that the judgment of the district court should be

Affirmed.

COMMONWEALTH v. BANK.

98 Mass. 12. (1867)

Bill of interpleader filed by the attorney general, pursuant to c. 19 of the Resolves of 1866, against the Emigrant Industrial Savings Bank, a corporation under the laws of New York, and William S. Houghton, for the purpose of determining whether five bonds of the Commonwealth, for one thousand dollars each dated October 1, 1861, and issued by virtue of the St. of 1861, c. 216, had not been made void as against the Commonwealth, by reason of a material alteration thereof; and, if not, then what were the respective rights of the respondents in and to the same, in the manner provided by the resolve.

HOAR, J. This case is one of great practical importance, and presents a question of much interest to the owners of a species of securities in which very large amounts of property are invested. Both parties have strong claims to the consideration of the court, and come

before us with equities which make a decision against either painful. We have in effect to decide which of two innocent parties shall suffer a considerable loss; and their rights are found to depend upon the application of principles in a manner which may lead to very important consequences.

Upon the evidence reported, we have no difficulty in finding the principal facts in issue. The five bonds which form the subject of the controversy are shown by satisfactory proof to be the same which were stolen from Mr. Houghton in May, 1863. On the 7th of November, 1863, they were received by the Emigrant Industrial Savings Bank in the usual course of business, for a valuable consideration, and without notice, express or implied, of any defect in the title which the bank then acquired, and without any reasonable cause to question their genuineness. In the interval of time between these dates the numbers of the bonds had been fraudulently altered; by whom, it does not appear; but the natural inference would be, by the thief, or some one in privity with him.

These bonds were payable to the holder or bearer, and were negotiable instruments which would pass by delivery. The important questions which we have to decide are, 1. Is the alteration of the numbers upon the bonds a material alteration? 2. If not, is it such an alteration as, if made with a fraudulent purpose, will discharge the contract, so that it will be invalid in the hands of a bona fide holder for a valuable consideration, without notice, whose title is acquired after the alteration?

No case has been cited in which such an alteration has ever been held to be material, and we are not aware that any can be found. We think the change of the numbers was not a material alteration of the bonds.

The remaining question involves a point of greater difficulty. It has been held that an immaterial alteration, if made with a fraudulent intent, will avoid a written instrument. 1 Greenl. Ev. sec. 568; 2 Parsons on Notes & Bills, 572, and cases there cited. But it is to be noticed that each of these text writers gives as the reason of the rule, that the party who loses the benefit of the writing has wilfully and wrongfully destroyed the identity of the contract. But if the rule is not thus limited in its application, and if the attempt to perpetrate a fraud may be justly punished by a loss of his right to enforce the contract, it remains to be considered whether the incapacity to sue will follow the instrument into the hands of an innocent holder, who has taken it in good faith. It has indeed been decided in the case of

a material alteration of a note, that it becomes invalid even in the hands of a subsequent indorsee for value. Wade v. Withington, 1 Allen 561. But the opinion in that case was put upon the express and only ground that the identity of the contract was destroyed; that the indorsee had not received the note which the promisor made. We do not find that it has ever been held that even a fraudulent alteration of a paper upon which a contract is written, leaving the language of the contract, in form and substance, unchanged, and not affecting the manner of its legal proof, would so far affect the validity of the contract as to make it invalid in the hands of an innocent holder, wholly ignorant of the fraud. The general rule is that he who is guilty of a fraud shall not be permitted to avail himself of it. If the rule is extended further, and if, on grounds of public policy, it should be held that one who claims title under the fraudulent person shall only succeed to his rights, it is difficult to see the just application of the principle to the case at bar. The innocent holder of a negotiable security payable to bearer does not take his title from that of any previous holder, but under the original contract of the promisor, as construed by the law. The thief who stole these bonds had no title to them whatever. The innocent holder does not claim under him, in form or substance. The promisor may have parted with them without consideration, but that makes no difference. The promise to pay to the bearer or holder attaches to the possession for value without notice of the unaltered contract.

The numbers placed upon these bonds gave the Commonwealth means of checking or detecting an over-issue of them, perhaps some security against forgery, and the means of tracing the particular instrument through successive changes of ownership. To the owners of the bonds after they were issued they afforded the means of identifying their property. But this might have been done by a private mark upon the back of the paper or by the stamping of the owner's name upon it. We cannot think that the fraudulent removal of such a mark of identification could affect the rights of parties not privy to the fraud, nor affected with notice of it. The case is wholly different from those cited in argument, of securities tainted with usury, and the like, where a statute makes the contract void, into whosesoever hands it may come. Here is no statute impediment. Nor is the holder met with the difficulty that, though without his own fault, he has failed to receive the contract which the promisor made. He is innocent of any fraud; he has the contract unchanged in form and with nothing added or taken away which affects its obligation or proof. It is a question

of the policy of the law which discountenances fraud but seeks to inflict the penalty for it only on the fraudulent; and which protects the free circulation of negotiable paper.

We are of the opinion that the Emigrant Industrial Savings Bank has established its title to the bonds in question against the Commonwealth, and is entitled to a decree accordingly.

Note. With respect to the proof of alterations the decisions are in hopeless conflict. There are at least six different views as regards presumptions. These six views, as stated in Hughes on Evidence are as follows: "(1) a presumption exists that the alteration was made contemporaneously with, or before, the execution of the instrument; (2) a presumption exists that it was made after the execution of the instrument; (3) no presumption exists in any case as to the time when it was made; (4) no presumption exists as to the time when it was made if no suspicious circumstances are apparent on the face of the instrument, but where there are suspicious circumstances connected with it there is a presumption that it was made after the execution of the instrument; (5) as a general rule, it is presumed to have been made contemporaneously with the execution of the instrument, but if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing; (6) the presumption, if any, which arises, depends upon the character of the instrument." And, as stated in Hughes on Evidence, "The first of these views is based largely on the presumption of innocence, and is recognized in numerous decisions (Lewis v. Watson, 98 Ala. 479, 39 Am. St. Rep. 82; Hagan v. Merchants' Ins. Co., 81 Ia. 321, 25 Am. St. Rep. 493; Hunt v. Gray, 35 N. J. L. 27; Brand v. Johnrowe, 60 Mich. 210). The second view is supported by comparatively few decisions, and it has been severely criticised. It still obtains, however, in a few jurisdictions, and seems to be confined for the most part to negotiable instruments. The third view is supported by many decisions (Merritt v. Boyden, 191 Ill. 136, 60 N. E. R. 907; Simpson v. Davis, 119 Mass. 269, 20 Am. Rep. 324; Martin v. Tuttle, 80 Me. 207, 14 Atl. R. 207). The fourth view is supported by decisions of several leading courts (Smith v. United States, 69 U. S. 219; Powell v. Panks, 146 Mo. 620; Alabama etc., Land Co. v. Thompson, 104 Ala. 570, 53 Am. St. Rep. 80; Bradley v. Dells Lumber Co., 105 Wis. 245; Collins v. Ball, 82 Tex. 259). The fifth view, according to Reynolds, is the American rule (Reynolds' Steph. Evid., art. 89). While the sixth view is supported by Stephen, Taylor and Greenleaf, as well as by many decisions (Bailey v. Taylor, 11 Conn. 531, 541; Boothby v. Stanley, 34 Me. 515, 516)."

THE BEST EVIDENCE RULE.[1]

CERNY v. GLOS.

261 Ill. 331. (1914)

CARTWRIGHT, J. The circuit court of Cook County entered a decree setting aside a tax deed to Jacob Glos, one of the appellants, and a quit-claim deed executed by him to Emma J. Glos and A. H. Glos, the other appellants (as clouds upon the title of John Vaclav Cerny, the appellee, to lot 90 in Claflin's subdivision of block 1 of Johnston & Lee's subdivision of the south-west quarter of section 20, township 69 North, range 14, in Cook county, and the record has been brought to this court by appeal.

We find it impossible to affirm the decree in this case. The appellee, having alleged title to the lot, asked the court to set aside a tax deed as a cloud on his title, and his ownership being denied by the answers, he was required to prove that he was the owner of the lot. Unless a party shows title to land where the title is in issue, it is not for him to complain that there is a cloud upon the title. (Wing v. Sherrer, 77 Ill. 200; Walker v. Converse, 148 id. 622; Glos v. Goodrich, 175 id. 20; Glos v. Kenealy, 220 id. 540; Coel v. Glos, 232 id. 142.) The only evidence that appellee had title consisted of a certified copy of a deed dated August 12, 1909, from a master in chancery to him, and the copy was objected to on the ground that no sufficient foundation had been laid for the introduction of secondary evidence. Section 36, of chapter 30 of the Revised Statutes fixes the conditions upon which a certified copy of a record of a deed may be read in evidence, and there was no attempt whatever to comply with the conditions there prescribed. So far as appeared, the master's deed was in existence and in the possession of another party in the same city where the case was heard. The tax deed and the deed from Jacob Glos to the other appellants were all proved by certified copies, and each copy was objected to for want of a sufficient foundation for its introduction. The court erred in admitting the copies in evidence and making them the basis of its decree (Scott v. Bassett, 174 Ill. 390; 186 id. 98, and 194 id. 602; Glos v. Talcott, 213 id. 81.) We are not authorized to disregard rules prescribed by the General Assembly for the admission

[1] Hughes on Evidence, p. 217.

of secondary evidence, and every citizen is entitled to the benefit of such rules.

The decree is reversed and the cause is remanded.

Reversed and remanded.

POST v. LELAND.

184 Mass. 601. (1904)

LATHROP, J. This is an action of contract under the St. of 1890, c. 437, against brokers, to recover various sums of money paid by the plaintiff to the defendants as margin for the purchase of certain securities bought and afterwards sold by the defendants. The case was sent to an auditor, who found for the defendants. It was afterwards tried in the Superior Court before a jury. A verdict was returned for the defendants, and the case is before us on the plaintiff's exceptions to the exclusion of evidence, and to the refusal to give certain instructions requested. We will consider these in their order.

The first exception relates to the refusal of the judge to admit secondary evidence of the contents of letters from the defendants to the plaintiff. The plaintiff testified in the first place that he had received the letters, but that they might be lost, he did not know. Then he testified that he had not any letters, which he subsequently qualified by saying: "We did not bring the letters here." There was no attempt to show that any search had been made for the letters or that they were lost, and the judge rightly excluded secondary evidence of their contents.

Exceptions overruled.

TRAINOR v. LEE, CITY TREASURER.

34 R. I. 345. (1912)

PARKHURST, J. This is an action of the case to recover the sum of four hundred and forty-three dollars and twenty-one cents ($443.21), for services rendered by the plaintiff as Chief of Police, Town Ser-

geant, and Dog Officer of the town of Cranston and the city of Cranston.

The next exception relates to the testimony offered by the defendant's counsel, that there was no appropriation made by any proper authority, from which payment of the plaintiff's claim could properly be made. Defendant's counsel offered himself as a witness as to the facts, without attempting to produce, or to account for the lack of, record evidence on this point, where it was quite evident that such record evidence would and should have been produced, if it existed. It is quite manifest that it would have been error to allow him to offer his oral evidence of such matters. 3 Elliot Ev. sec. 1942; Owings v. Speed, 5 Wheat. 420; Hutchinson v. Pratt, 11 Vt. 402; Gilbert v. New Haven, 40 Conn. 102; Morrison v. Lawrence, 98 Mass. 219, 221. This exception is overruled.

We find no error; the exceptions alleged by the defendants are all overruled, and the case is remitted to the Superior Court, with direction to enter judgment upon the verdict for the plaintiff.

EASTMAN v. DUNN.

34 R. I. 419. (1912)

PARKHURST, J. This is an action of assumpsit brought in the Superior Court for the Counties of Providence and Bristol, April 29, 1909, by Albert F. Eastman against William J. Dunn and Daniel C. O'Connor, to recover damages for breach of an express contract set forth in the plaintiff's declaration in two counts.

Exception 9. This was an exception to the admission in evidence of a copy of a letter which the plaintiff testified he wrote to each of the defendants and sent to them by registered mail. It was objected to on two grounds—first, because it was not the best evidence and no notice had been given to the defendants to produce the original, and second, because it was written by the plaintiff himself and had no relevancy except as proof of the truth of a claim made by him in it; in other words, because it was manufactured testimony. We are of the opinion that the letter was properly admitted; it was a duplicate carbon copy without erasure or alteration of a letter proved to have been sent by registered mail to each of the defendants, and appears upon its face to be only a notice to them that the plaintiff would be obliged to

resort to law for the protection of his rights. It does not purport to set forth the terms of any contract between the parties and cannot be regarded as self-serving. Nor, in view of the fact that the letter was a mere notice intended to ascertain definitely if possible whether the defendants would carry out their agreements with the plaintiff without in any way stating what those agreements were, do we think it was necessary that the defendants be notified to produce the original; it seems to us to come within the exception to the rule regarding secondary evidence, to the effect that a notice of claim may be proved by parol or by the duplicate and the original need not be required. 25 Am. & Eng. Encyc. of Law (25 ed.) p. 171; Eagle Bank v. Chapin, 3 Pick. 180; Penn &c. R. Co. v. Braxton, 34 Fla. 479.

COM. UNION ASSUR. CO., LTD. OF LONDON, ENG., v. WOLFE.

41 Okla. 342. (1914)

Action by C. Dale Wolfe, trustee of the estate of D. A. Trotter & Co., against the Commercial Union Assurance Company Limited, of London, England. Judgment for plaintiff, and defendant brings error. Affirmed.

Opinion by GALBRAITH, C. D. A. Trotter & Co., a partnership, were the insured. After the loss upon the policy in suit, the insured were adjudged bankrupts, and the plaintiff, C. Dale Wolfe, was elected and qualified as trustee, and, as such, prosecuted the action on the policy, and recovered a judgment, from which the defendant appealed.

The remaining assignments complain of the rulings of the court in admitting oral testimony over the objection of the insurance company to prove the value of the stock of merchandise destroyed by the fire. Plaintiff was permitted to prove by the insured that the value of the stock of goods at the time the policy was written was $2,600; that the amount of goods purchased between that time and the date of the fire was $600; that the amount of his cash sales between the date of the policy and the loss was about $600. This witness was corroborated as to the value of the stock at the time of the fire by another witness. who was formerly in partnership with the insured, and owning a half interest in the business, and who sold out some four months before the policy was written, but was familiar with the stock and its value

from that time up to the fire. This, it seems, was the best evidence available for showing the amount of the loss in the absence of the books, which, it had been shown, could not be produced, because they had been lost or stolen, and through no fault or negligence of the insured. This character of testimony was competent. Its weight was for the jury. Secondary evidence is admissible in the absence of primary evidence, especially where the absence of primary evidence is satisfactorily accounted for.

"And the one general rule that runs through all the doctrine of trial is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed." (3 Blackstone, p. 368.)

"Where there are no books or inventories, or they have been destroyed, secondary evidence is admissible to show the value of the destroyed property." (Cooley's Briefs, Law of Ins., p. 3123.)

"Merchants engaged in different lines of business, who saw a stock of insured goods before it was destroyed by fire may testify as to the value of such stock, although their testimony is not as satisfactory as might be desired." (Graves v. Merchants & Bankers' Mfg. Co., 82 Iowa 637, 31 Am. St. R. 507.)

The effect of this testimony was to show that the loss sustained exceeded $2,000, the amount of the policy being $1,500, and it was sufficient to sustain the verdict of the jury for the full amount of the policy.

The record shows that the trial court gave every instruction to the jury which the insurance company requested, and that every possible phase of their contention in this suit was fairly presented to the jury in the instructions by them, and, there being ample evidence in the record to sustain the verdict of the jury, we see no reason why the judgment appealed from should not be

Affirmed.

WATSON v. LAWRENCE.

134 La. 194. (1914)

BREAUX, C. J. This suit involves the possession of notes, aggregating, exclusive of interest, exactly $2,000.

Interveners' demand was rejected in the District Court.

In the Court of Appeal the court decided that there should have been a nonsuit on the intervention.

The ground of the Court of Appeal for the conclusion was that the certificate of marriage was the best evidence of the marriage, and, until it was produced, or its absence explained, the evidence of eyewitnesses to the ceremony and all other evidence, was secondary and not the best evidence.

The vital question here is whether there was a legal marriage of the mother of interveners to John Lawrence.

The *onus* of proof of the alleged marriage was with the interveners.

Evidence in support of the alleged marriage, said the court, consists of the depositions of several witnesses, including the mother of the interveners Mrs. Julian Lawrence, taken in Illinois, who testified that she had in her possession a marriage certificate, "which she attached to her answer."

Interveners in the District Court offered the deposition of this witness and the asserted certificate.

Objected to by plaintiff because certificate was not authenticated, and objection to the testimony urged because it was an attempt to prove marriage by parol; that there was a certificate of marriage which could be obtained.

According to the decisions heretofore cited, parol evidence of persons present, or within whose knowledge beyond question there was a marriage, is considered as direct or primary evidence.

The full text of the opinion does not convey the meaning that proof of marriage is to be considered in the same light as evidence relating to proof of the title to realty and testimony relating to written agreements.

The fact of marriage may be established by oral testimony of persons who were present at the ceremony. Encyc. of Evidence, vol. 8, p. 465.

For reasons stated, it is ordered, adjudged, and decreed that the judgment of the District Court is annulled, avoided, and reversed as between plaintiff on the one hand and the interveners, and as between interveners and the defendant.

It is further ordered, adjudged, and decreed that the judgment of the Court of Appeals is avoided, annulled, and reversed as between the interveners on the one hand and the plaintiff and intervener on the other, and the defendant and intervener on the other. The case is remanded to the District Court, to be further proceeded with in accordance with the views before expressed.

BORNSTEIN v. BERLINER.

184 Ill. App. 519. (1912)

McSURELY, J. Lena Bornstein, hereinafter called plaintiff, obtained a judgment for $600 against Ella Berliner and Isaac Berliner, hereinafter called defendants, in a suit alleging breach of covenants of warranty contained in a warranty deed of a 30 acre farm in Michigan conveyed by defendants to plaintiff. We are asked to reverse this judgment.

The only thing for this court to pass upon is the question of the proof by the defendants of the alleged abandonment of the strip by the railroad. This question was one for the jury to determine. However, we think the Trial Court erred in excluding certain material and competent testimony upon this point. A. S. Miller, called on behalf of defendants, was asked concerning a sale of part of the right of way of the Kalamazoo and Lake Michigan Railway Company, the witness acting at the time as agent for the latter company. It was sought to show by him that another company had purchased a portion of the right of way of the K. & L. M. Ry. Co., as tending to show abandonment of the intention by the Kalamazoo Company to construct its railroad upon the right of way in question. It was also sought to show by the same witness statements made by the president of the K. & L. M. Ry. Co. with reference to the use of the right of way. The court sustained objections to this testimony for the reason, as stated by the court, that the contents of any written document could not be shown by parol evidence. We do not understand that defendants were seeking to prove the contents of a written document, but only the fact of transactions touching portions of the right of way of the Kalamazoo Company. We believe the defendants were entitled to have the jury consider such transactions, together with the statements of the president of the Kalamazoo Company touching the plans and intentions of this company with reference to its right of way. The rulings of the court in this regard constituted prejudicial error.

As the case must therefore be remanded, we refrain from commenting upon other points suggested in the briefs of counsel.

Reversed and remanded.

SHARP v. HAMILTON.

12 N. J. L. 109. (1830)

DRAKE, J. This cause was tried at the Sussex Circuit, in November, 1828. The defendant confessed lease, entry, and ouster.

The plaintiff also gave some evidence of the possession of the defendant, and obtained a verdict for one moiety of the disputed premises. This verdict is sought to be set aside.

Francis Hamilton, after testifying that Benjamin Hamilton took possession under him in 1815, on cross-examination said, that "he inferred that defendant went into possession under witness because there was an agreement respecting the premises between witness and defendant." And the agreement being in writing, and not produced, gave rise to a motion to overrule Francis Hamilton's testimony; which the court refused to do. The fact that he actually took possession was one entirely independent of the agreement, and the testimony as to that simply, was clearly without objection. There is more plausibility in requiring the writing as the best evidence to shew *under whom* he took possession, and whether under witness or not. But the evidence sought to be overruled was not as to the particular manner or *terms of the holding,* but merely *under whom* he took, or held. And it appears to me too strict where the witness swears to a change of possession, and that it was by his permission or consent, or that the defendant *took under him,* to overrule that evidence because there may be a written lease not produced; and especially where the party offering the evidence is a stranger to the contract. It is every day's practice, in actions of ejectment, to shew that one person *held, or holds, under another,* by the payment of rent, or even by an acknowledgment of the tenant, without any enquiry whether there is a written contract unless, there be an attempt to shew further particulars of that contract. In the action for use and occupation, the question assumes a different aspect. There the tenancy is directly put in issue. It lies at the foundation of the plaintiff's action to shew that the defendant held by his permission; and if there be a writing, that must be produced, not merely to shew the fact of the holding, but that its contents may be looked into to ascertain the *quantum* of damages to be recovered.

Rule discharged.

COMMONWEALTH v. BLOOD.

77 Mass. 74. (1858)

Complaint on St. 1855, c. 215, sec. 24, for keeping intoxicating liquors with intent to sell them in this commonwealth.

Upon the trial the government witnesses testified to going with a search warrant to the house of the defendant, and that the defendant was not there while they were in the house. The district attorney asked a witness, "Where did you go while there?" The defendant objected to any evidence of what the witness did in his house in his absence; but the court ruled that the question might be put.

The witnesses then went on to detail their acts in the house, and testified that they found on the premises intoxicating liquors and five jugs. The district attorney asked, if these jugs were labelled. The defendant objected to this. The court overruled this objection, and admitted the following answer, which was objected to by the defendant, "The jugs were labelled with pieces of leather marked with what was in them." The district attorney then asked, "What marks were on the labels?" To this the defendant objected. The court overruled this objection, and the witness answered, "The mark on the label was rye whiskey." The jugs were not produced, nor the labels, nor any reason given for not producing them.

MERRICK, J. The several rulings of the presiding judge, to which exceptions were taken at the trial, appear to us to have been correct.

The jugs and decanters of which a description was taken are well known implements of traffic in that branch of trade; and it was competent therefore to give evidence, in support of the prosecution, of their appearance and the particular places in the dwelling-house in which they were found. The labels on the jugs do not come within any class of written instruments, the contents of which cannot be proved without producing the original paper or document, or accounting for its loss or unavoidable absence; 1 Greenl. Ev. sec. 90; and the testimony therefore concerning them was unobjectionable.

Exceptions overruled.

RUMBOUGH v. SOUTHERN IMPROVEMENT COMPANY.

112 N. C. 751. (1893)

Civil action, heard before Hoke, J., and a jury at Spring Term, 1892, of Madison Superior Court. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

BURWELL, J. The plaintiff's action is founded upon a draft drawn in his favor by W. E. Watkins for the sum of $950 and accepted by said Watkins in the name of the defendant corporation.

It appears from the statement of the case on appeal that some of the declarations of the president of defendant company, as to the authority of Watkins to accept this draft, as we understand the record, were contained in a letter written by him, and the objection was made that the contents of the letter should not be spoken of, because it was not produced, nor was its non-production properly accounted for.

If its contents were to be used as proof of a contract on the part of the company that it would acknowledge and pay the draft, then it was very clearly improper to allow the witness to speak of the contents, the letter not being produced, unless its loss was accounted for according to the rules of law, for, in that view of the matter, this was to allow parol testimony to establish what was contained in a written agreement without first proving that the writing was lost or destroyed.

Inasmuch as the defendant is entitled to a new trial for the error above pointed out, we do not deem it necessary to consider any other of the numerous exceptions taken by its counsel.

New trial.

C. & N. W. R. R. CO. v. INGERSOLL.

65 Ill. 399. (1872)

MCALLISTER, J. This was an action on the case, in the County Court of De Kalb County, by appellees against appellant as common carrier, for breach of duty in not delivering a quantity of wheat and barley shipped by the former, in cars of the latter, at Malta, in said county, to be safely and securely carried to Chicago, and delivered to H. S. Eaton, consignee.

The third point arising is that there was error in excluding secondary evidence offered by appellant, of the contents of a written contract between the parties, under which, as was claimed, the grain in question was shipped. The evidence of loss of original was this: The station agent of appellant obtained it from appellees at Malta; then he delivered it into the hands of another person to take it to Chicago and deliver it to "the general freight agent, Wheeler, who was the proper custodian of it. He had an office in Chicago, where he usually kept papers, books, and documents belonging to his department, which, with the contents was burned October 9, 1871. Neither the messenger who took it from the station agent at Malta, nor Wheeler, nor any witness who ever saw it in Wheeler's possession or in his office, was called as a witness. Now from the facts that the station agent at Malta gave it to a messenger to take it to Wheeler, and the burning of his office, the court was called to presume that the messenger delivered it to Wheeler, and the latter put it in his office, and that it remained there, and was therefore destroyed with the office. This is not a sufficient foundation for secondary evidence. Wheeler should have been called to show that he received and placed it in his office, and that it was there at the time the office was burned. The court must be satisfied by sufficient evidence, that the paper is destroyed or cannot be found. Mariner v. Saunders, 5 Gilm. 113, and cases there cited.

Judgment reversed on another ground.

THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY v. BROWN.

44 Kan. 384. (1890)

VALENTINE, J. This action was brought before a justice of the peace in Pratt county, by J. H. V. Brown, against the Chicago, Kansas & Nebraska Railway Company, for injuries alleged to have been received by the plaintiff through the negligence of one of the employes of the railway company.

The case was taken to the District Court of Pratt County, where it was tried before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for $109.41; and

the defendant, as plaintiff in error brings the case to this court for review.

It is further claimed that the court below erred in permitting Brown, over the objections and exceptions of the defendant, to testify with regard to certain "time-checks." Brown was not only a section-man, but he also acted as the clerk for the section foreman, Shanahan, keeping his books, making out time-checks, etc. One of the questions presented and litigated in the court below in this case, was whether the plaintiff was at the time of the accident working for the Chicago Kansas & Nebraska Railway Company, or for the St. Joseph & Iowa Railroad Company; and to prove that he and all the other section-men on that railroad were working for the Chicago, Kansas & Nebraska Railway Company, he testified, over the objections and exceptions of the defendant, that all the time-checks were made out in the name of the Chicago, Kansas & Nebraska Railway Company, and this he testified to without any further foundation for the introduction of such testimony than that he did not have such time-checks in his possession or under his control. No evidence was introduced that they were lost or destroyed, or that any search had ever been made for them, or that any notice had been given to either of the foregoing railroad companies, or to anyone else, to produce them. We think this was error. (Brock v. Cottingham, 23 Kan. 383, 388, 389, and cases there cited.)

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

COONROD v. MADDEN.

126 Ind. 197. (1890)

COFFEY, J. This was a suit by the appellee against the appellant upon a promissory note. Answer: Payment. Reply: General denial. Trial by the court finding and judgment for the appellee, over a motion for a new trial for the full amount of the note with reasonable attorney's fee. The assignment of error calls in question the propriety of the ruling of the Circuit Court in overruling the motion for a new trial.

On the trial of the cause the appellant introduced and read in evi-

dence a certain check executed by him to the appellee, and also testified that such check was given and received in part payment of the note in suit.

The appellee, over the objection of the appellant, was permitted by the court to testify that the check was received by him in part payment of another and different note from the one in suit, giving the date and amount of said note, and its rate of interest. He also testified that the appellant had paid the note to him in full, and that it had been surrendered to the appellant.

The objection to this evidence, stated by the appellant to the court at the time of its introduction, was that it was secondary, and that the appellee could not give evidence of the contents of such note without first proving its loss, or serving notice upon the appellant to produce it in court to be used as evidence in the cause.

It is undoubtedly the general rule that before parol evidence can be received of the contents of a written instrument, it must be shown that such instrument is lost or destroyed, or that such instrument is in the hands of the party against whom the evidence is offered, and that upon proper notice so to do he has failed to produce the original in court to be read in evidence. Smith v. Reed, 7 Ind. 242; Mumford v. Thomas, 10 Ind. 167; Manson v. Blair, 15 Ind. 242; Anderson, etc., Co. v. Applegate, 13 Ind. 339; Frazee v. State, 58 Ind. 8; McMakin v. Weston, 64 Ind. 270.

But there is a well defined and well established exception to this general rule. The general rule has no application where the written instrument is merely collateral to the issue; as where the parol evidence relates to matters distinct from the instrument of writing, although the same fact could be proved or disproved by the writing. Wood Practice Evidence, p. 4.

In the case of Daniel v. Johnson, 29 Ga. 207, it was held that payment might be proved by parol to have been made in promissory notes, without the production of the notes. The rule is that where the parol evidence is as near the thing to which the witness testifies as the written evidence, then each is primary. Wharton Law of Evidence, sec. 77.

In this case had the note upon which the appellee claimed the check read in evidence had been applied, been produced in court, the parties would have been as far from the real controversy between them as they were before its production, namely, the question as to whether the check was applied on that note or the note in suit. For

this reason we think the case falls within the exception to the general rule above stated.

Affirmed.

AUSTIN v. GALLOWAY.

73 W. Va. 231. (1913)

WILLIAMS, J. John P. Austin, sheriff of Mason county and as such administrator of Lucy Stallard, deceased, recovered a judgment against John Galloway for $173.46, and he was awarded this writ of error thereto. The action was upon a note dated 16th of October, 1907, and payable to plaintiff's intestate one day after date, signed John Galloway. Defendant demurred and pleaded *non est factum* and non assumpsit. The demurrer was overruled and on the issues of fact the jury found for plaintiff.

After suit was brought plaintiff's attorney sent the note to the attorney in Kentucky representing the administrator of Lucy Stallard in that state for the purpose of proving its due execution by defendant, by witnesses in Kentucky whose depositions were to be taken, and which were thereafter taken to be used as evidence over the objection of defendant, and this is assigned as error. Its loss is accounted for by proof of the following facts. After the depositions were taken they were sealed and addressed to the clerk of the Circuit Court of Mason County as registered mail; but, at the request of the West Virginia attorney, the note was not filed as an exhibit with the depositions, and was mailed to him in a separate envelope, not as registered matter. That night the post office burned, and all the letters were destroyed, except registered matter which the postmaster had placed in an iron safe. This is sufficient accounting for the loss of the note to make secondary proof admissible. Before sending the note to Kentucky, the plaintiff's attorney had made a copy of it. His testimony shows that the copy is an exact copy of the original. In view of these facts it was not error to admit the copy of the note as evidence. Secondary evidence is admissible when primary evidence is not to be had. Snyder v. Bridge Co., 65 W. Va. 1.

Reversed and remanded on other grounds.

REDUS v. MATTISON.

30 Okla. 720. (1912)

ROSSER, C. The defendant in error, M. M. Mattison, hereinafter called plaintiff, brought this action against W. R. Redus, plaintiff in error, hereinafter called defendant, in the justice court of Porter township, Wagoner county, Okla., to recover an amount alleged to be due him for getting out certain stone used in defendant's building in Tullahassee, Oklahoma. There was a judgment for plaintiff in the justice court. The defendant appealed to the County Court of Wagoner County, where the case was tried before a jury, and there was a verdict and judgment for plaintiff for $63.45.

The defendant assigns as error the action of the court in permitting the plaintiff to testify as to the contents of an order signed by defendant, for certain stone of the class known as "dimension stone." It was shown by the plaintiff that he produced the written paper at the trial in the justice court, identified it and introduced it in evidence, and it was shown that he had not had it since, and that he and his attorney had been unable to find it, though they had endeavored to do so. Upon this showing, it was proper to admit evidence of its contents.

The evidence in the case is ample to sustain the verdict, and there being no material error in the case it should be affirmed.

By the Court: It is so ordered.

All the Justices concur.

CORONA KID CO. v. LICHTMAN.

84 N. J. L. 363. (1912)

KALISH, J. This writ of error brings under review a judgment of $23,000 obtained by the plaintiff below against the defendant below, in an action for trover and conversion. The main controversy between the parties related to the ownership of certain portions of horsehides sent by the Corona Kid Manufacturing Company, the assignor (for whose use the plaintiff sues,) to one Albert Guiges, for tanning.

Another reason urged upon us by the plaintiff in error for a reversal of the judgment, is that the trial judge, against the defendant's ob-

jection, permitted the plaintiff to introduce in evidence certain sheets of ordinary yellow foolscap which appeared from the testimony of Elliott, who had been the bookkeeper of Guiges and general manager of the office, to be copies made by him of a ledger of a private set of books, which contained, among other entries, itemized accounts of the sales by Guiges to the defendant, the dates when made and the goods consigned, a classification of the articles, the number of pounds, the price per pound and the extensions. The object of this testimony was manifestly to establish with some degree of certainty the amount of goods belonging to the plaintiff, which came into the possession of the defendant. The witness Elliot further testified that he had personal knowledge of the consignments recorded in the ledger; that he had made up and presented to the defendant statements of the itemized accounts as they appeared upon the ledger and of which the yellow sheets were a true copy and which itemized accounts being examined and checked off by the defendant were paid by him. The defendant did not deny the accuracy of the itemized accounts presented to him; nor did he attempt to controvert the testimony of the witness regarding his, the defendant's conduct, respecting the same. When at the trial, the defendant was called upon by the plaintiff to produce these original itemized accounts, he excused their non-production upon the plea that they had been lost or destroyed. It is obvious that the defendant's acceptance of the statements of account as true accounts of the transactions between him and Guiges, relating to the purchase of the plaintiff's property by the defendant Guiges, evidenced as this was by the defendant checking off the items of the statements and paying them, rendered these statements the best and primary evidence of the facts stated therein, in like manner as would have resulted if a letter had been written by the defendant, embracing the items of account, acknowledging that he had received the same and sent his check in payment therefor. It appearing from the defendant's statement in court that the original itemized statements were lost or destroyed, under the well known rule of evidence, the plaintiff was entitled to give secondary evidence of their contents. As the yellow sheets were testified to by Elliott as being a true copy of the original itemized accounts, both the original statements and the copy having been made by him, the copy was admissible as secondary evidence.

The judgment will be affirmed.

MOREY v. HOYT.

62 Conn. 542. (1893)

TORRENCE, J. This is an action to recover damages for the wrongful conversion and detention of personal property. It was originally brought against George A. Hoyt, but during its pendency he died and his executors entered to defend.

From the record it appears that Hoyt leased certain land in Stamford in this state, with buildings and machinery thereon, to a New York corporation for the term of five years from May 1, 1881. This was done by a written lease in the ordinary form, executed by both parties and dated the 19th of January, 1881.

Hoyt had written a letter to his tenant to the effect that the tenant might make certain changes and alterations in and upon the leased premises, and that Hoyt would make no claim to any machinery which the tenant might put into or upon the same. The plaintiff called a witness who testified that at a certain interview between himself, Hoyt, and one of the plaintiffs, the witness, at the request of Hoyt, read aloud a portion of the letter. He was then asked to state the part which he had read aloud and in substance whether Hoyt had or had not admitted that the statements in such portion were true. The defendants objected to any oral statements of the contents of the letter, on the sole ground that such evidence was secondary and inadmissible until it had been shown that the letter itself could not be produced. The court admitted the evidence.

The evidence was claimed as an admission of the contents of a writing by one whose admissions were relevant. It was claimed as primary and not secondary evidence. If it was primary evidence the objection taken is not tenable. The rule that the oral admissions of a party against himself and those claiming under him, although relating to the contents of a writing, are primary evidence, seems to be well established, whatever we may think of its wisdom. So far as we are aware this court has never had occasion to consider this rule, but elsewhere the weight of authority is in its favor. It is established in England, as shown by the authorities cited. "Primary evidence means the document itself produced for the inspection of the court, or an admission of its contents proved to have been made by a party whose admissions are relevant." Stephen's Digest art. 64; Earle v. Picken, 5 Car. & P. 542; Slatterie v. Poole, 6 Mees. & Wels. 664; The Queen v. Basingstoke, 14 Q. B. 611; 1 Taylor's Ev. sec. 410;

And it seems to be the prevalent rule in this country. 1 Greenl. Ev. (16th ed.) sec. 96; Smith v. Palmer, 6 Cush. 513; Loomis v. Wadham, 8 Gray 557; Blackington v. City of Rockland, 66 Me. 332; Wolverton v. The State, 16 Ohio 173; Edgar v. Richardson, 33 Ohio Wt. 581; Edwards v. Tracy, 62 Penn. St. 374; Taylor v. Peck, 21 Gratt. 11.

The wisdom of this rule is questioned by Judge Taylor in his work on evidence and from the cases cited in a note to the paragraph from Greenleaf cited above it would seem that the courts in Ireland dissent from it, as do also the New York courts. The weight of authority, however, as before stated, seems to be in its favor, and we see no reason why it should not be applied in a case like the one at bar.

New trial on other grounds.

WISEMAN v. N. P. R. R. CO.

20 Ore. 425. (1891)

On March 19, 1890, the plaintiff J. J. Wiseman commenced an action in the Circuit Court of the State of Oregon for the county of Multnomah, against the defendant to recover the sum of $398.72, the value of certain household goods claimed to have been lost by defendant in transit. On the trial, the plaintiff gave evidence tending to prove the issues on his part and then rested.

BEAN, J. By section 691 Hill's Code, it is provided that "there shall be no evidence of the contents of a writing other than the writing itself, except in the following cases. * * *

"When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default." This section is a declaration of the common law rule. The theory upon which secondary evidence of the contents of a writing is admissible is that the original writing cannot be produced by the party by whom the evidence is offered within a reasonable time by the exercise of reasonable diligence. The question is always one of diligence in the effort to procure the original. No precise rule has been or can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show "that he has in good faith exhausted in a reasonable degree all

the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." (1 Greenl. on Ev. sec. 558; Simpson v. Dall, 3 Wall. 460; Johnson v. Arnwine, 42 N. J. L. 451; Kelsay v. Hanmer, 18 Conn. 310.) Thus in Mariner v. Saunders, 5 Gilm. 117, the court says: "From the nature of the subject, there is some difficulty in laying down a general rule defining the extent and vigilance of the search which a party must make before the court may conclude that the paper is destroyed or lost. As a general rule, however, we may say that when, from the ownership, nature or object of a paper it has properly a particular place of deposit, or where from the evidence it is shown to have been in a particular place or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all papers in the office or place should be examined. On the whole, the court must be satisfied that the paper is destroyed and cannot be found. It is true, the party need not search every possible place where it might be found, for then the search might be interminable, but he must search every place where there is a reasonable probability that it may be found." This rule is founded on reason and justice, and to require any less degree of diligence would be to defeat the object of reducing agreements to writing. As was said in Rankin v. Crow, 19 Ill. 629: "The party wishing to avail himself of the benefit of such secondary evidence should be required to make at least the same effort that it is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found."

The degree of diligence which shall be considered necessary, in any case will depend upon the character and importance of the document, the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be supposed to be found. If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in

the attempt to produce the original than if it is desired to be used as proof in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost. (American Life Ins. Co. v. Rosenagle, 77 Pa. St. 507.)

The existence and contents of the supposed contract, as well as the claim of defendant based upon it, is denied by the plaintiff in the case at bar. The issue thus being joined, its execution and contents were very material to defendant in establishing its defense. Indeed, defendant seeks to exempt itself from liability solely by reason of this contract.

The fact that the person to whose possession the paper was traced resided out of the state, did not excuse defendant from a diligent effort to procure it.

Judgment of the court below is therefore affirmed.

THE PEOPLE v. HENKLE.

256 Ill. 584. (1912)

FARMER, J. In the year 1911 the school directors of district No. 155 levied a school tax for educational purposes of $1.50 on the $100 valuation which was extended against the property lying in said high school district. In the same year the board of education of the high school levied a tax of $7,000 for educational purposes and $16,000 for building purposes, which was extended against all the property embraced in the high school district, including the portion of district No. 155 which lies in the township high school district.

Three objections are urged to the validity of the tax levied by the board of education of the high school district.

The second objection is, that the building tax was illegal and void because no authority had been given the board of education to erect a building at any election called for that purpose where the statutory notice required for such election had been given. The record of the board of education showed that on June 8, 1909, an election was ordered to be held on June 19, 1909, for the purpose of voting on the question of building a township high school building, and the secretary was instructed to post notices of said election in the manner required by law. It was shown by the poll-books of said elec-

tion that on that date 230 votes were cast for building a township high school and five against it. The records of the board do not show that notice of the election had been given as required by statute, and appellant contends that this was fatal to the validity of the levy for building purposes. A printed copy of the notice of the election was offered in evidence, and members of the board testified the notice was posted in three of the most public places in the district, as required by law. It was also shown that a copy of the notice, with the certificate of the secretary of the board of its having been posted ten days prior to the election, had been among the records of the board and was used in evidence and made an exhibit in former litigation in which the high school district was involved, but the certificate of posting could not be found. It was competent to prove the loss of the certificate of posting, and the fact that the notice had been posted, by parol evidence, and the uncontradicted testimony showed that the notice had been posted in the manner required by law. (1 Elliott on Evidence, sec. 216, 15 Cyc. 326.)

Judgment affirmed.

RISHER v. MADSEN.

94 Neb. 72. (1913)

SEDGWICK, J. The plaintiff brought this action in ejectment in the District Court for Douglas County to recover the possession of five lots in block 74, in Denson, an addition to the city of Omaha. The answer was a general denial. The trial resulted in a verdict and judgment for the defendant, and the plaintiff has appealed.

Mrs. Risher testified that in 1901 she received a letter from the defendant; that it came by mail in the usual way; that she had made diligent search for the letter and was unable to find it; that she knew by whom it was signed, and that the defendant's signature appeared on the letter; and that she was able to state the contents of the letter. This she was asked to do, but, upon objection, her evidence was excluded. This evidence was apparently excluded on the ground that Mrs. Risher was not in position to know the signature of the defendant, but she testified positively that she did know his signature, and there was no attempt to cross-examine her as to her means of knowl-

edge, and in the absence of such cross-examination we think the evidence should have been admitted.

Reversed.

POST v. LELAND.

184 Mass. 601. (1903)

LATHROP, J. This was an action of contract under the St. of 1890, c. 437, against brokers, to recover various sums of money paid by the plaintiff to the defendants as margin for the purchase of certain securities bought and afterwards sold by the defendants. The case was sent to an auditor who found for the defendants. It was afterwards tried in the Superior Court before a jury. A verdict was returned for the defendants, and the case is before us on the plaintiff's exceptions to the exclusion of evidence, and to the refusal to give certain instructions requested. We will consider these in their order.

The first exception relates to the refusal of the judge to admit secondary evidence of the contents of letters from the defendants to the plaintiff. The plaintiff testified in the first place that he had received letters, but that they might be lost, he did not know. Then he testified that he had not any letters, which he subsequently qualified by saying: "We did not bring the letters here." There was no attempt to show that any search had been made for the letters or that they were lost, and the judge rightly excluded secondary evidence of their contents.

Exceptions overruled.

FEDERAL CHEMICAL CO. v. JENNINGS.

112 Miss. 514. (1916)

COOK, P. J. This is a suit on an open account. Appellee, in this case, entered into a written contract with appellant to act as its agent at Hebberville, Ky. By the terms of this contract appellant shipped to appellee, upon his order, three tons of fertilizer. The contract provided that appellee was to sell this fertilizer to the farmers of

his vicinity, and when sold on time he agreed to take the purchaser's notes and indorse the same to the appellant. The contract provides for reports, discounts, etc. The record further shows that appellee, before he sold the balance of the fertilizer, had a fire, and therefore wanted to cancel his contract, and deliver the fertilizer on hand to appellant, or some substituted agent of appellant. There is evidence that some correspondence was had on this subject.

There is no possible doubt that appellant should have recovered judgment in this case but for the incompetent testimony which the court, over the objections of appellant, permitted to go to the jury.

Appellee, defendant below, contended that he had been released by appellant. He testified that this release was made by letter; that the letter was in his desk in Kentucky. Appellant objected to this testimony for obvious reasons. The court, however, overruled the objection, stating, "I could not by any manner or means control a paper that is in Kentucky." It seemed to have been the court's opinion that oral evidence of the contents of a writing could be given, when it appeared that the writing was without the territorial jurisdiction of the trial court. It will be observed that there was no effort to prove that the letter was lost, destroyed, or misplaced; and if lost, or mislaid, there was no effort made to show that it could not be found after a diligent search, but on the contrary, the location of the letter was fixed. Later on the objection was renewed and again overruled, the judge remarking, "It is out of the jurisdiction of the court." So far as our investigations lead, this ruling of the trial judge was unique and announces a brand new rule of evidence. We find ourselves unable to go with the judge, and must decline to indorse his reasoning.

Reversed and remanded.

SMITH v. BROWN.

151 Mass. 338. (1890)

Contract on a judgment. At the trial in the Superior Court, before Blodgett, J., the jury returned a verdict for the plaintiff; and the first named defendant alleged exceptions.

DEVENS, J. At the trial, the plaintiff put in evidence the record of a judgment such as that declared on, recovered by him against Brown and Griffiths in New York, and called Shaver, who was a member

of the bar of New York who produced a press copy of an alleged assignment of the judgment to Brown and Griffiths, dated February 3, 1887, having previously testified that he had last seen the original in February, 1881, and that the same was lost.

The defendant excepted to the admission of the press copy produced by Shafer, upon the ground that it was not competent evidence to prove the assignment of the plaintiff's judgment. He contends that a more satisfactory kind of secondary evidence existed, known to the plaintiff before the trial, and that no evidence was given that a search had been made for the assignment alleged to have been lost, and therefore that the evidence was inadmissible. We understand that the first of these objections refers to the formal assignment filed in the court; but the testimony of Shafer, who is a lawyer, afforded evidence that might well satisfy the judge that this could not be taken from the files of the court, and it was also but a second assignment, which would have been inoperative had the first been really made, although it might have furnished evidence for the files of the court of the transfer. If there are several sources of information of the same fact, it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to. 1 Greenl. Ev. sec. 84. It was sufficient to prove the loss of the instrument upon which the plaintiff relied; this being done, he was entitled to prove its contents by the secondary evidence of a press copy. Goodrich v. Weston, 102 Mass. 362. Whether there was sufficient evidence of the loss of the assignment of which secondary evidence was admitted, was a question of fact for the presiding judge. Unless his finding was based upon an error of law, or upon evidence which, as matter of law, was insufficient to sustain the finding, it would not be here open to revision. Brigham v. Coburn, 10 Gray 329, 331. Commonwealth v. Morrell, 99 Mass. 542. Walker v. Curtis, 116 Mass. 98. The evidence of Shafer was positive as to the losses of the assignment. He did not expressly testify that he had made search, but this is implied from his statement. The defendant did not see fit to cross-examine upon this point, and there is no rule which requires that there should be affirmative evidence of a search under such circumstances. If satisfied to give credit to the witness, the judge was authorized to hold the loss of the instrument sufficiently proved, and then to admit the secondary evidence of the press copy.

Exceptions overruled.

KING v. RANDLETT.

33 Cal. 318. (1867)

This was an action to recover the possession of two and one-half undivided sixteenth shares of the Independent Tunnel Mining Claims in Plader county. The plaintiff, in the complaint, alleged title in himself, and an ouster by the defendant. The plaintiff, in the statement of his cause at the commencement of the trial, stated his title to the demanded premises to be derived by purchase by deed or bill of sale. The plaintiff stated, as a witness in his own behalf, that the deed or bill of sale was lost, and, under the objection and exception of the defendant, gave testimony of its contents.

The testimony of the witness, Deiner, was offered to show title to the demanded property in the plaintiff; the defendant objected to its introduction, on the grounds of incompetency and irrelevancy, and excepted to its admission.

SANDERSON, J. The plaintiff having obtained his alleged interest in the Independent Tunnel Company's claim by purchase, which purchase was evidenced by a bill of sale or deed, was bound to produce his deed or bill of sale, for the purpose of proving his title—that being the best evidence—or prove its loss for the purpose of laying a foundation for the introduction of secondary evidence as to its contents. (Patterson v. Keystone Mining Company, 30 Cal. 365.) The evidence of the loss was insufficient. It showed that in all probability the bill of sale was left in the plaintiff's store at Yorkville at the time the plaintiff sold out and delivered possession of the store and its contents to his nephew. His nephew, at the time of the trial, was in the county and in reach of the process of the court, yet he was neither called as a witness as to what had become of the bill of sale, nor does it appear, that he was ever questioned by the plaintiff touching the missing document. It is true that the plaintiff searched the store about a year after the nephew took possession, but that was not sufficient. Under the circumstances detailed by the plaintiff, which are very similar to those presented in the case just cited, inquiry should have been made of the nephew for the missing document in order to sufficiently establish its loss. It does not appear that any search was made for the purpose of this trial.

Judgment reversed and a new trial ordered.

MATHES v. LUMBER CO.

173 Mo. Ap. 239. (1913)

FARRINGTON, J. The plaintiff recovered judgment against the defendant for the sum of $668.40 in a suit instituted in Stone county and afterwards removed on change of venue to Lawrence county.

Plaintiff offered testimony to show the acts, declarations and conduct of the unknown inspector in order to prove that he was an agent of the defendant. Plaintiff also offered evidence, which was admitted by the trial court, to show that the shipper or his agent, under the rule of the railroad company, must sign before the railroad company will bill the cars out, and that this unknown inspector signed the name of the Switzer Lumber Company and took the numbers of the cars, and that the ties were shipped. The plaintiff testified that the ties were billed out to the Great Western Railroad Company. The railroad agent testified that it is the custom of railroad companies that buy ties to send their inspector at the time the ties are loaded for the purpose of making an inspection. No offer of the bills of lading was made by the plaintiff, nor was there any showing that plaintiff was unable to procure the originals or copies of the bills of lading in these shipments. Neither was the printed rule of the railroad company, which the railroad agent testified to with reference to the shipper or his agent signing, offered by the plaintiff, nor was there a showing made that plaintiff was unable to procure the printed rule for use as evidence. There was no evidence offered to show that the defendant knew the unknown inspector was representing it on this or any other occasion, before or after; it was the first dealing the plaintiff ever had with the alleged agent or with the defendant.

Appellant assigns as error the action of the trial court in permitting the contents of the bills of lading to be shown by the oral testimony of the man who was the agent of the railroad company at the time the cars are alleged to have been shipped out, and also the action of the trial court in permitting this agent to testify concerning the contents of the printed rule of the railroad company to the effect that the company requires the shipper or his agent to sign before the cars are shipped.

This contention is well made for the reason that there is no showing whatever that the bills of lading and the printed rule of the railroad company were lost or that it was beyond the power of the plain-

tiff to produce them; in fact, there is nothing in the record to show any effort on the part of the plaintiff to obtain them for use at the trial. The contents of a writing that is unaccounted for cannot be shown by oral testimony (Morton v. Heidorn, 135 Mo. 609; City of St. Louis v. Arnot, 94 Mo. 275; Merrill Chem. Co. v. Nickells, 66 Mo. App. 1, c. 692; Houck v. Patty, 100 Mo. App. 302.)

Appellant insists that there is no competent evidence in this record showing that there was anyone representing it at the time the shipment was made who could bind it for the 1671 ties or any proceeds or benefits from them, or that it in any way ratified the acts of the person or persons who converted these ties that belonged to the plaintiff.

It is shown that a copy of the letter written by the appellant to the respondent on October 7, 1909, together with a copy of the letter which appellant had previously received from respondent, was sent by appellant to Wolf but this in no way shows that Wolf was appellant's agent. The natural and probable course for appellant to pursue, having purchased the 5,000 ties from Wolf and afterwards being informed that some ties had been converted belonging to the man from whom the 5,000 were purchased by Wolf, and it appearing that this man was charging appellant with the wrongful taking, would be for appellant to immediately convey the full particulars to its vendor.

The record wholly fails to establish an agency or ratification. Entertaining this view, we must hold that the Trial Court erred in admitting the testimony herein alluded to, and in refusing to give defendant's peremptory instruction. The judgment is reversed and the cause remanded for a new trial.

All concur.

HOBLIT v. HOWSER.

171 Ill. App. 19. (1912)

PHILBRICK, J. The only question at issue in this case, being one of fact, is whether or not the appellant Hoblit had either actual or constructive notice, such as would have put him upon inquiry of this mortgage; and if he had then he is bound thereby. Watkins testified that the entire transaction between Hoblit and himself was

carried on by correspondence, that in the letters written by Watkins to Hoblit he notified Hoblit of the existence of this indebtedness to Howser and notified him that this mortgage was made to secure that indebtedness and that it was a lien upon these premises. Hoblit does not deny the carrying on of these negotiations by correspondence, but denies that any such notice was given him by Watkins. The deposition of Watkins was taken in California and read in the trial, and in that deposition the contents, or substance of the contents of the letters which passed between Watkins and Hoblit was testified to by Watkins; and it is insisted by appellant that no sufficient foundation was laid for the introduction of this testimony on the part of Watkins. The record discloses, however, that Watkins had either destroyed or had mislaid all of these letters, that he never had any supposition or knowledge that they would ever be of any value or that there would ever be any necessity for their use, and that they were destroyed in the natural course of business after the transaction was closed, that he had made diligent search in the places where such letters were usually kept or would usually be found, that he has no knowledge of the existence or whereabouts of the letters now, and that he is unable to find or produce them. This preliminary proof made by complainant was sufficient to authorize the admission of secondary evidence of the contents of these letters, and the court did not err in admitting it.

Decree affirmed.

PRUSSING v. JACKSON.

208 Ill. 85. (1904)

BOGGS, J. This was an action for libel, against the plaintiff in error by the defendant in error. The declaration charged that the plaintiff in error composed and caused to be published in the Chicago Times-Herald, a daily newspaper published in the city of Chicago, a certain false, scandalous, defamatory and libelous article, set forth *in haec verba,* with appropriate innuendoes, in the declaration.

The plaintiff in error filed the plea of not guilty, and the cause was submitted for trial before the court and a jury. The jury returned a general verdict finding the plaintiff in error to be guilty and assessing the damages of defendant in error at the sum of $20,000.

We think, however, the plaintiff in error has lawful right to complain of an erroneous ruling of the court as to the admissibility of evidence. It was sought to maintain the action against the plaintiff in error as the author of the alleged libelous publication which appeared in the Chicago Times-Herald. He was in nowise connected with the management, control or publication of the newspaper and had no interest therein. The action was against him on the alleged ground that he was the author of a statement, in the form of a letter which appeared as a part of the publication, and that he had given or permitted one Varian, a reporter of the newspaper, to take, the letter under such circumsances as that he should be held to have procured it to be published. The cause was tried before the court and a jury.

We think the objection preferred by counsel for the plaintiff in error called upon the court to rule whether the printed publication was admissible in evidence without the production of the writing of which the plaintiff in error was the author and which it was asserted had been reproduced in the printed article, and which, so reproduced, constituted the alleged libel.

The rule is, in order to let in secondary evidence of the contents of a written instrument the person in whose possession it was lost must be produced unless shown to be impossible, in which case search among his papers must be proved, if that can be done. In all events search must be made for the paper with the utmost good faith, and be as thorough and vigilant as if the rule were that all benefit of the paper would be lost unless it be found. Mariner v. Saunders, 5 Gilm. 113; Sturge v. Hart, 45 Ill. 103; Chicago and Northwestern Railway Co. v. Ingersoll, 65 id. 399; Williams v. Case, 79 id. 356; 4 Ill. Cyc. Dig. pp. 524, 526, 527.

In Clifford v. Drake, 110 Ill. 135, the notes made by a reporter of a newspaper of the conversation had with the defendant, and the article prepared by the reporter, from the notes, for publication, were held to be primary evidence, and the rule was there recognized that the printed article was secondary evidence, and was competent to be received in evidence only after proof had been made excusing the production of the primary evidence. We think this rule has the support of the greater weight of authority. In 18 American and English Encyclopedia of Law (2nd ed. p. 1076) the rule deducible from the authorities is stated as follows: "In an action for libel the publication itself is, of course the best evidence of the charges made in it, and the original document containing the defamatory matter must be produced, if possible; but where the original has been destroyed or lost

beyond a reasonable hope of finding it, or is in the hands of an adverse party who refuses to produce, secondary evidence of the contents is admissible."

Reversed and remanded.

BOWLAND v. McDONALD.

82 Kan. 84. (1910)

PORTER, J. The plaintiff brought this action in forcible detainer, alleging that he is the owner of lands in Rawlins county, consisting of 240 acres, and that the defendant unlawfully and forcibly keeps him out of the possession of a strip of land seven feet wide along the north side thereof. The defendant is a Kansas corporation, engaged in conducting a telephone business, and claims that the strip of land in question is a part of a public highway, and that it has a right to place its telephone poles there so long as the same do not materially interfere with public travel. The case was tried to a jury, and at the close of the evidence the court instructed a verdict for the plaintiff. Judgment was rendered upon the verdict, and the defendant appeals.

The record of Rawlins county, including the road records, were destroyed by fire December 5, 1905. The defendant, therefore, sought by secondary evidence to show that from 1886 a sixty-foot road had been established along this line. The principal claim of error is that the court ruled out its evidence offered for that purpose. The defendant first offered in evidence what is known as the George A. Ogle atlas of Rawlins county, containing a plat of the township where the land in controversy is located showing this road to be sixty feet wide, and also offered to prove by the person who claimed to have made the plat for the publishers of the atlas that he made it from the original road records before they were destroyed. An objection to the evidence was sustained. The defendant also offered evidence for the purpose of showing that this road sixty feet in width had been worked at the public expense long prior to 1897 and had been traveled by the public since the year 1886; and then contended that, having proved this condition there is a presumption that the road overseer of that district as well as the county clerk had performed their several duties under the act of 1897. The court refused to per-

mit the proof. It was manifest error to exclude the testimony. The destruction of the road record of the county having been shown, the evidence offered by the defendant for the purpose of proving the existence of a sixty-foot road was clearly the best evidence that could be obtained.

For the error in excluding the testimony offered the judgment is reversed and the cause remanded for another trial.

SMITH, CAREY & CO. v. LIVE STOCK CO.

92 Kan. 5. (1914)

SMITH, J. The principal ground of error urged on the rehearing is the admission over appellant's objection of the affidavit and testimony of William McDermott, intervener, as to the contents of a letter written by him to E. D. Small in reply to an application for the original loan of $10,000; the contention on the part of the appellant being that the loan was made to the Small brothers, and that the name of the Atchison Live Stock Company as indorsed on the back of the note by one of the Small brothers, as manager of the Atchison Live Stock Company as security. On the other hand, the appellee contends that the loan was made to the Atchison Live Stock Company and the note was secured by the Small brothers, individually, as securities.

The letter of E. D. Small, one of the partners and an officer of the Atchison Live Stock Company, applying for the loan, and the reply of Mr. McDermott thereto constituted the contract antecedent to the execution of the note for the loan. This letter was produced in evidence and was clearly an application of the Small brothers for the loan. McDermott's contention is that in his letter, replying to the application, he proposed to make the loan to the Atchison Live Stock Company and that the loan was consummated in accordance therewith to the corporation. It is conceded that the note for the loan was signed on the face by the individual members of the firm of Small Brothers and was indorsed on the back, "Atchison Live Stock Company, by J. D. Small, Mgr."

After procuring an order for the inspection of the books, papers, etc., as indicated in the former decision, the appellee took the deposition of E. D. Small, in the State of California, to which place

Small had removed. Neither the plaintiff nor the receiver appeared at the taking of the deposition, but on the trial made full objections to each question and answer as incompetent, immaterial and irrelevant, which objections were overruled.

No evidence was given by the witness in his deposition nor was he asked whether he had made any search for the letter or made any attempt to find it or when or where he last had it or saw it.

Relying upon this proof of the loss of the letter, the intervener was allowed, over the objection of the appellant, to introduce his affidavit setting forth, from recollection, a copy of his letter. He also went upon the witness stand and testified orally, in substance, to the same effect. The appellant objected and excepted on the ground that it was secondary evidence and that no proper foundation had been laid that the primary evidence could not have been procured, and that there was no evidence that the original evidence was either lost beyond recovery or was destfoyed. The objection should have been sustained.

The judgment is reversed and the case is remanded for a new trial.

HARBISON-WALKER REFRACTORIES CO. v. SCOTT.

185 Ala. 641. (1914)

Action by Dixie Davis Scott against the Harbison-Walker Refractories Co. From a judgment for plaintiff defendant appeals. Affirmed.

MCCLELLAND, J. The action was for damages to property in consequence of setting off of explosives in and about quarrying stone. The appellee was the plaintiff, and the appellant the sole defendant.

The court properly declined, on objection by plaintiff to allow defendant to show that Burrows conveyed the lot to W. J. Scott, and not to the plaintiff. The deed was the best evidence of the fact.

There is no error in the record. The judgment is

Affirmed.

GLOS v. CESSNA.

207 Ill. 69. (1904)

CARTWRIGHT, J. On December 6, 1902, appellee, Sarah Louise Cessna, filed in the office of the clerk of the Circuit Court of Cook County her application to the court to register her title to a lot in Chicago pursuant to an act concerning land titles, in force May 1, 1897.

On the hearing before the examiner the applicant offered in evidence an abstract of title and also a book of abstracts, both of which were objected to by appellant. According to the report of the examiner, he stated, in reply to the objections, that the abstract was good for the purpose of satisfying him as to the applicant's title but not as proof of title against the objection of appellant, and that the book of abstracts was the property of the recorder of deeds, and the reference was made to him as examiner in order that he might have at his disposal the public records in the office of the recorder, and he would let the books go in subject to the objection. There was no evidence that the original deeds which appeared in the alleged abstract were lost or destroyed or that the abstract book was on file in the office of the recorder. The book was not identified in any way, and there was nothing to show that it was a public record, if it would have been admissible when so proved. The act for registering title may be of a progressive nature, but not to the extent of abrogating rules of evidence and permitting the introduction of abstracts without proper foundation being laid. (Glos v. Hallowell, 190 Ill. 65.)

Reversed and remanded.

EMPIRE CO. v. LINDENMEIR.

54 Colo. 497. (1913)

SCOTT, J. The defendants in error on the 11th day of May, 1907, and who were at that time the owners of certain lots and buildings in the city of Fort Collins, entered into a written contract with the Cole-Potter Construction Company, a corporation, for the construction of a theater building on the said premises. Under the contract the construction company was to provide all the materials and perform all

the work to be performed under the contract and specified therein. The work and material were to be in accord with the plans and specifications of the architect, E. H. Moorman, named in the agreement. and which plans and specifications were declared to be a part of the contract. But it was expressly agreed:

"It is further understood and agreed by the parties hereto, that any and all drawings and specifications prepared for the purpose of this contract by the said architect are and remain his property, and that all charges for the use of the same, and for the services of said architect, are to be paid by the said owner."

The only errors complained of and discussed in the briefs, and which we are therefore justified in considering, are (a) the admission of oral testimony upon the hearing concerning the plans and specifications referred to in the original contract, the original and no copy of which could be produced at the trial, (b) error of the court in the allowance of the $703.35, interest, and (c) the rendition of judgment without proof of the payment of the lien judgments.

In regard to the first contention, it will be noticed that the plans and specifications were under the contract, to be and remain the property of the architect. It seems also, that no copy of these was recorded with or as a part of the contract, and also that the original nor a copy was attached to the contract. The architect testifies concerning the disposition and loss of the plans and specifications as follows:

"I did have the original plans and specifications of that building. but I can't find them. I made a search for them very carefully. Q. Who had these plans and specifications? A. The original drawings are always found on file or supposed to be on file, in the architect's office."

The rule of this court in this respect seems to be:

That a particular instrument existed, is the most material inquiry; the facts of its existence and the contents of it are matters to be tried by the jury; the loss of it must be made out to the satisfaction of the court. The law exacts nothing unreasonable in such a case. If parol proof of the loss establishes the fact with reasonable certainty, that is sufficient. No precise rule can be safely laid down upon this subject, further than this, that diligent search and inquiry should be made of those places or persons in whose custody the law presumes the instrument to be. Hobson v. Porter, 2 Colo. 28; Londoner v. Stewart, 3 Colo. 47; Hetson v. Davenport, 4 Colo. 169.

The law does not, however, require direct and positive evidence of the loss or destruction of the document, but requires only such evi-

dence as will raise a reasonable inference of its loss or destruction. 17 Cyc. 543.

There was no error in the admission of the contract exclusive of the plans and specifications referred to therein.

Modified and affirmed.

KITZA v. OREGON SHORT LINE R. CO.

169 Ill. App. 609. (1912)

SMITH, J. This action was brought by appellant, Michael Kitza, against the Oregon Short Line Railroad Company in the Municipal Court of Chicago, to recover damages caused by the negligence of the railroad company in failing to safely carry sheep from Ketchum, Idaho, to Chicago, Illinois. The declaration consists of six counts. All the counts, except the fourth, declare on a verbal or common law contract of shipment. The fourth count declares upon a written agreement between the plaintiff and defendant.

At the close of the evidence the trial court instructed the jury to return a verdict in favor of the defendant, and judgment was entered upon the verdict so returned. Appellant, plaintiff below, prosecutes this appeal to reverse the judgment.

Several grounds are urged for the reversal of the judgment. We deem it necessary to the decision of the case, as represented by the record, to consider and discuss only one feature of the case; namely that the contract between the parties was a written contract and it was not put in evidence, but recovery was sought upon an alleged agreement shown not to be the final contract which was entered into between the parties.

From the testimony of the appellant himself it appears that he told the agent at Ketchum, Idaho, after the sheep had been delivered to the carrier at that point: "Well, we are shipping to Chicago. 'Well, all right,' he says. He made a contract out. He handed it to me and I signed it. Yes, I looked it over. Q. Did you read it? A. Yes." The plaintiff further testified that he kept his contract until he reached Omaha, where he exchanged it for a return ticket. The question is thus presented by the record whether a plaintiff may recover upon an oral or common law contract, consisting of words spoken at the time of shipment, when a written contract was entered into between the

parties at the time of the shipment and before the freight started upon its route. In our opinion there can be no such recovery. The law is well settled that where oral negotiations or conversations are subsequently embodied in a written contract, the written contract supersedes the oral one, and is the contract, and the only contract. There cannot be an oral contract and a written contract subsisting between the parties where, subsequent to the conversation or negotiations, the contract is embodied in writing. This is the ordinary rule, and it applies in cases of shippers and carriers as well as between other parties. Hutchinson on Carriers, 3 Ed., Secs. 167, 168, 171; 6 Cyc., pp. 416, 420, 427; Richmond & D. R. R. Co. v. Shomo, 90 Ga. 496.

The burden of proof was upon appellant to prove the contract upon which the shipment was made. This he failed to do, and he cannot recover upon a contract which did not exist. The plaintiff availed himself of the benefits of the written contract, which he says was entered into, and yet he occupied the attitude in the trial court of seeking to avoid its terms and conditions by basing his case upon an oral contract of shipment.

It is urged that there is no evidence of a written contract, whether the paper which the plaintiff signed was a contract or otherwise, and that the court cannot assume that the paper signed by the plaintiff was a contract. The answer to that contention is that the court was not required and this court is not required to make any such assumption. The plaintiff himself proved by his testimony that a written contract was entered into; that he read the contract and signed it. For the purpose of this case, therefore, it is shown without controversy that a written contract was entered into for the shipment of the sheep in question at the initial point of shipment and before the actual transit of the shipment was commenced. It appears from the evidence of the plaintiff that he had been engaged in the sheep business in Idaho for twenty-seven years, during which time he had shipped mainly to the Chicago market; and that he accompanied one or two shipments a year to Chicago over the route of the defendant company; and the plain inference is that he knew clearly the terms and conditions of the contract. He states positively that he read it. There is, therefore, no question in the case as to any illegal provisions in the contract of shipment for the contract is not before the court. The record is silent as to its terms and provisions. We think the evidence shows clearly the knowledge and assent of the plaintiff to this written contract, and whatever right of recovery he may have, if any, must be based, so far as this case is concerned, upon the terms and provisions of the contract

which subsisted between the parties for the shipment of the stock in question.

We are of the opinion that under the facts and circumstances disclosed by the evidence in this case, a common carrier may require a contract of shipment to be in writing. It appears that the stock was to be transported beyond the terminus of the defendant company, and required the stock to be delivered to a connecting line of transportation, and we see no reason why it would not be perfectly proper and legal for the defendant to require the contract of shipment to be in writing, especially in view of the fact that the Interstate Commerce law requires the carrier to issue a bill of lading or receipt. It has been expressly held that a carrier may require a written contract. Texas Mexican C. Rwy. Co. v. Gallagher, 70 S. W. 897; Ft. Worth & D. C. Ry. Co. v. Wright, 58 S. W. 846; C. R. I. & P. R. R. Co. v. Colby, 69 Neb. 572.

The evidence in this case shows that it was customary for the defendant company to require a written contract in every instance, and this custom was of long standing and was well known to plaintiff.

The evidence shows very clearly as we have stated above, that the contract between the parties was not offered in evidence. Plaintiff could not recover upon a contract which did not exist; and the court did not err in directing a verdict for the defendant. The judgment is affirmed.

Affirmed.

CONN. FIRE INS. CO. v. MOORE.

154 Ky. 18. (1913)

Opinion of the court by William Rogers Clay, Commissioner—Reversing.

Plaintiff, Mona M. Moore, was engaged in the millinery business in the town of Clinton, Kentucky. On March 28, 1911, the Connecticut Fire Insurance Company issued to her a policy insuring her stock against fire in the sum of $500. During the life of the policy her stock of goods was destroyed by fire. She brought this action to recover the amount of the policy. A trial before a jury resulted in a verdict and judgment in her favor in the sum of $500. The insurance company appeals.

The policy sued on provides that "the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company." The fire occurred on November 24, 1911. Suit was brought on January 22, 1912. Among the defenses interposed by the company was a plea in abatement, based on the fact that suit was prematurely brought. To avoid the effect of this plea plaintiff alleged that before the commencement of the action defendant had denied all liability under the policy, and had thereby waived proof of loss. The proof offered by plaintiff on the question was the testimony of Earnest Reid, who stated that he had read a letter from the defendant to its local agent, J. M. Kemp, denying liability under the policy. Reid made a copy of the letter, and was permitted, over the objection of the defendant to read the copy. Defendant's agent testified that he delivered the letter to defendant's attorney. Where a party desires to introduce proof of the contents of a letter in the possession of the adverse party, the proper practice is to serve notice on the adverse party to produce the letter. In the event of his failure to do so, other evidence of the contents of the letter is not admissible. Heilman Milling Co. v. Hotaling, 21 K. L. R. 950. In this case there was no notice to the defendant to produce the letter, and proof of the contents of the letter should not have been admitted.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

BROCK v. SATCHELL.

130 La. 853. (1912)

SOMMERVILLE, J. The first of these two suits, which have been consolidated, was brought by Mr. Brock to have a tax title, under Act No. 82 of 1884, confirmed, and to have him declared the owner of certain real estate. He made Charles Satchell or his heirs defendants, and had them cited through a curator *ad hoc*.

There was judgment in his favor, from which judgment Mrs. Elizabeth S. Morris as the sole surviving heir of her father and mother, Mr. and Mrs. Charles Satchell, prosecutes this appeal, as a party in interest. She was not a formal party to the suit in the trial court; but

she assigns in this court certain errors appearing on the face of the record, and she asks for a reversal of the judgment appealed from.

The judgment will be reversed.

The plaintiff, Richard Brock, was the defendant in a suit by H. F. Lewis & Co., Limited, to compel him to take the title referred to. He made a pretense of refusing the title on various grounds, and which we sustained in 123 La. 1, 48 So. 563. Notwithstanding the judgment in his favor, Mr. Brock accepted the title from H. F. Lewis & Co., Limited, and then filed this suit, asking for a judicial confirmation of the title which he had just judicially declared to be invalid, null and void. The curator *ad hoc,* whom he had appointed to represent the real owner of the property, filed an answer, in which he denied the title of his principal. On the trial, plaintiff did not produce and file a copy of the title which he was asking to have confirmed. He did not file the title which he had acquired from H. J. Lewis & Co. Limited. He offered no competent evidence whatever to prove title to real estate. His only offers of evidence, as disclosed by the record and the docket entries, were a certificate from the register of conveyances, showing that a copy of the act of sale, under Act No. 82 of 1884, to D. Negrotto had been registered, and two *ex parte* affidavits, one showing that the assessors had erred in the description of the property sold, and the other, by plaintiff himself, that he and his authors had had possession of the property involved for an indefinite time. The plaintiff and the curator *ad hoc* failed to inform the trial court that we had decided that the title sued upon was null and void.

The conveyance certificate did not prove title in plaintiff, or in any one else. The two *ex parte* affidavits were incompetent to prove title; and they did not even cover the matter of title in their scope. They contain the parol statements of the witnesses, and cannot be used to establish title to real estate. They should have been objected to on the ground of incompetency by the curator *ad hoc,* and the objection would have been sustained. Had the title under Act No. 82 of 1884 been produced and filed, the district judge would have seen as we had in 123 La. 1, 48 So. 563, that that title did not refer to the property claimed in plaintiff's petition.

MOON v. HARRIS.

122 Minn. 138. (1913)

DIBELL, C. At the November, 1912, general election the contestant, C. O. Moon and the contestee, J. O. Harris, were rival candidates for the office of register of deeds of Beltrami county. The contestee, Harris, was declared elected by the county canvassing board by a majority of five. The contestant, Moon, appealed to the District Court. Upon trial had he was declared elected by a majority of three. The contestee appeals from the order denying his motion for a new trial.

The contestee claims that the court was in error in finding that the contestant received a plurality of the votes cast.

The official returns are evidence of the votes cast. The presumption is that they correctly state the result of an accurate count of the ballots. The testimony of the precinct officers tended to show that the precinct returns were correctly made and were at the time of the trial in the condition when made. This evidence was offered to repel the attack made upon their integrity, because of the careless method of their keeping after their return to the county auditor. The contestant, however, necessarily relied upon the legal presumption of their accuracy. There is no presumption that a recount would show a gain or loss either for Moon or for Harris. The presumption is to the contrary. To make a successful contest it was necessary for Moon by a recount of the ballots, to change the result declared by the canvassing board to a result in his favor. It was not necessary to recount every precinct of the county. It was necessary that he go far enough to show errors in the returns of certain precincts, which, when corrected and added to the presumptively correct official returns, gave him a plurality. And so when by a recount of the 65 precincts he reduced Harris' vote by 3, and increased his vote by 5, thus reducing the plurality of Harris on the recount precincts to 15, and used the official returns of Grant Valley and Frohn, where he had a plurality of 18 he was elected by a plurality of three.

This result was reached by the trial court, and correctly, unless such suspicion attached to the keeping of the ballots and returns as required their exclusion, and this is a claim made by the contestee.

The contestee claims that the ballots and returns were so carelessly kept and with so much opportunity of being tampered with, that they should not be received in evidence to overturn the finding of the county canvassing board.

The court found that the blue envelopes, containing the county ballots of the precincts of Frohn and Grant Valley, "were surreptitiously removed from the county auditor's vault by some person whose identity the evidence does not disclose." They disappeared during the progress of the recount.

There were a number of irregularities in the keeping of the ballots, in the way of stringing them, and in sealing them, and in returning them to the county auditor, and in keeping them after they were returned. Some seals were missing from the envelopes or were broken or were mutilated. The court specifically found that "the ballots were, when recounted by the inspectors, and when received in evidence herein, in the same condition as when counted by the judges of election." The difference between the total vote shown by the returns and upon the recount was only two. In referring to the ballots the trial court, in its memorandum, said:

"I am fully satisfied that they are intact and genuine, and that they are the identical ballots cast by the voters and are now in the same condition in every respect as when voted. This conclusion is based upon all of the testimony of the case, including that of two of the inspectors, as well as upon my own careful inspection of the envelopes and ballots."

The books are replete with cases stating, in one form or another, that the ballots are the primary or the best evidence in a contest of an election; but that to overcome the result of an official canvass by a resort to the ballots it must be shown that they are intact and genuine and have not been tampered with. Newton v. Newell, 26 Minn. 529; Stemper v. Higgins, 38 Minn. 222; Caldwell v. McElvain, 184 Ill. 552; Hartman v. Young, 17 Ore. 150, 20 Pac. 17, 2 L. R. A. 596, 11 Am. St. 787; Albert v. Twohig, 35 Neb. 563.

The question whether the ballots have been so preserved that they may be safely used to defeat the result shown by the returns is a question of fact the decision of which is with the trial court. The court found that the ballots and the returns, when offered in evidence, were in their original condition. It was in a better position than we can be for making a correct finding; and we hold that it was properly made.

It is likely true that in some jurisdictions ballots kept as these were would not be allowed in evidence to overturn the result of an official canvass and that a contestant as close to the ballots as Moon was would not be permitted to overturn the official count by their use. We think that under the finding the trial court was right in receiving them.

The election was very close. A slight change in the two uncounted

precincts would give the election to Harris; but the presumption is against such change. A slight tampering with the ballots might bring the same result; but the finding is that there was no tampering. The finding of the trial court that Moon was elected by a majority of three is supported by the evidence.

Order affirmed.

CHEEVER v. CONGDON.

34 Mich. 296. (1876)

GRAVES, J. This action was brought at the instance of David Congdon as guardian of Henry Congdon, a minor on the bond given by Edward H. Congdon as executor of Elisha Congdon, deceased, to recover an amount the minor was entitled to from the estate of Elisha Congdon, and which amount the Probate Court had ordered should be paid to him. The case was tried by the court without a jury. The defense was, that after attaining majority, Henry Congdon, who had been the ward of David, as before stated, settled the whole matter with Edward, the executor, and received from the latter in cash and note the entire amount due him. To make out this defense the defendants called Henry Congdon and he swore positively to the accord and satisfaction, and that it occurred in January, 1872. In the same connection he was asked by defendants when he became twenty-one years old. The plaintiff's counsel objected that the witness was incompetent to prove his own age until it should be shown that better evidence was not attainable.

The court overruled the objection and the witness answered that he became twenty-one on the 24th of December, 1870.

The objection was not well based. The witness was clearly competent. The only question about the testimony called for from him was confined to its value as evidence, and that was a matter to be considered by the judge in making up his findings of facts.

On the conclusion of the evidence the court found that the settlement was made as claimed, and as a consequence that the defense was established.

The judgment should be affirmed with costs.

The other justices concurred.

COMMONWEALTH v. STEVENSON.

142 Mass. 466. (1886)

Complaint for unlawfully selling intoxicating liquors to a minor, on January 20, 1886. Trial in the Superior Court before Thompson, J., who allowed a bill of exceptions, in substance as follows:

The government introduced as a witness one Rollins and asked him where he was born. His answer was, "In Boston." The district attorney then asked him how old he was. To this question the defendant objected; but the judge permitted the question to be answered, against the defendant's exception. The witness answered that he was twenty years old on May 15, 1885.

HOLMES, J. We see no sufficient reason why a person should not be allowed to testify to the date of his birth, if that question is fairly open on the exceptions. The certificate which is made evidence by the Pub. Sts. c. 32, sec. 11, is hearsay, and no more likely to be accurate than the sworn statement of the party concerned, based, as it must be on family tradition, and fortified by his knowledge of himself.

Exceptions sustained on another ground.

HILL v. ELDRIDGE.

126 Mass. 234. (1879)

Contract on an account annexed for goods sold and delivered. Answer: 1. A general denial. 2. Infancy, and that the goods sold were not necessaries.

At the trial in the Superior Court, before Gardner, J., without a jury, the only question in issue was that of the defendant's infancy. The defendant was a witness, and, against the plaintiff's objection, was permitted to testify that, when the goods were purchased, he was sixteen years of age, and that, at the time of the trial, he was twenty-three years of age. It appeared that the defendant's father was dead at the time of the trial, but it did not appear whether his mother was living or not. The defendant was the only witness as to his age, and no other evidence was offered in relation thereto. The judge found for the defendant; and the plaintiff alleged exceptions to the admission of the defendant's evidence.

BY THE COURT. This case does not present the question whether a person can be permitted to testify to the precise day of his birth. It is quite clear that one may testify, from his own knowledge of himself, whether he was twenty-one or sixteen years of age at a certain time (which was the only material point upon which the testimony of the defendant appears to have been admitted), and that such weight may be given to his testimony as the court or the jury trying the case may think it entitled to receive. See Cheever v. Congdon, 34 Mich. 296; Watson v. Brewster, 1 Penn. St. 381, 383; State v. Cain, 9 W. Va. 559, 570.

Exceptions overruled.

FIRST NATIONAL BANK v. JAMIESON.

63 Ore. 594. (1912)

The First National Bank of Bandon brought this action against C. E. Jamieson alone to recover upon a promissory note, executed in its favor by him and one Dunklee.

Defendant answered, admitting the execution of the note, but alleged that he signed merely as an accommodation maker, and that this was known to plaintiff that thereafter the note was fully paid and satisfied by the sale and transfer to plaintiff by Mrs. F. Dunklee of certain chattels of the agreed value of $450, which were accepted in full satisfaction of the note, said transfer being made to C. R. Wade, attorney and agent for the bank.

Plaintiff replied, denying the new matter alleged in the answer, and alleging that the transfer by Mrs. Dunklee to Wade was in trust to sell the property and apply the proceeds, so far as they would go, to the payment of the note, and not otherwise, and alleged that at the time Mrs. Dunklee made the transfer she did not own the property she assumed to sell, but had previously sold it to one J. P. Tuppers, who recovered the same by an action at law, and that nothing had been realized from the security. The execution of the note was admitted and defendant introduced a bill of sale from Fenetta Dunklee to C. R. Wade of the goods mentioned in the answer. Said bill of sale was upon its face an unconditional transfer to Wade as trustee for the bank. The defendant then offered oral testimony tending to show that the intent of such bill of sale was to liquidate the note. Wade testi-

fied, on rebuttal, that at the time of the transaction a written memorandum was made by him showing the purpose of the bill of sale; that he made two copies on the typewriter at the same time, each signed by himself, each written by the same impression of the typewriter, and each absolutely identical; that he kept one of these duplicates for his own use and gave the other to Mrs. Dunklee, marking his, "office copy." To the introduction of this instrument the defendant objected, and the objection was overruled. The admission of this testimony is assigned as error.

MCBRIDE, J. The memorandum amounted to a declaration of trust on the part of Wade, and being an exact counterpart of the one given to Mrs. Dunklee, made by the same impression of the instrument, and signed at the same time, it was as much an original as the one delivered to Mrs. Dunklee. It was a duplicate and therefore admissible as an original. 17 Cyc. 517; Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195 (17 S. W. 608, 27 Am. St. 861); State v. Allen, 56 S. C. 495 (35 S. E. 204); Nelson v. Blakely, 54 Ind. 29.

The judgment is affirmed.

Affirmed. Rehearing denied.

HAY v. FIRE CLAY CO.

179 Mo. App. 567. (1913)

This is a suit on a contract of employment alleged to have been entered into between plaintiff and defendant corporation for the rendering of services by plaintiff to defendant. The finding and judgment were for plaintiff and defendant prosecutes the appeal.

NORTONI, J. It appears the unsigned writing introduced in evidence was typewritten and that used on the trial was a carbon copy. The witness Crawford testified that what is known both as an original and a carbon copy were made at the same time, and the carbon copy was furnished to plaintiff by him. Plaintiff approved it as setting forth the terms of the agreement, and it seems retained this carbon copy. The original, made at the same time as the carbon copy was neither produced nor called for, and the witness did not know its whereabouts. Because of this alone, it is urged the court erred in receiving the carbon copy in evidence, but we are not so persuaded. Such carbon copies are made by the same imprint as the original and there is essentially

indited thereon the identical matter. Such being true, if the original copy accurately reveals the statements therein, the carbon copy does likewise. Therefore, carbon copies so made are regarded rather as originals and, as such, primary evidence under the rule of evidence here invoked, for they essentially partake of this quality in the process of inditing their contents. It is clear the writing was not objectionable as secondary evidence because it was a copy. (See Wright v. Chicago, B. & Q. R. Co., 118 Mo. App. 392, 94 S. W. 555; Bond v. Sandford, 134 Mo. App. 477, 114 S. W. 570.)

The judgment should be affirmed. It is so ordered.

GLADSTONE LUMBER COMPANY v. KELLY.

64 Ore. 163. (1913)

The plaintiff, Gladstone Lumber Company, a corporation, in its own right and as assignee of sundry claims of others, recovered judgment against the firm of Kelly & Mahoney. While the partnership was indebted on the original claims Kelly conveyed to his wife certain real property, the record title of which theretofore was in the name of them both jointly. An execution having been issued on the judgment and returned unsatisfied, the plaintiff began this suit against Kelly and his wife to set aside the conveyance mentioned, on the ground that the husband had made it with intent to hinder, delay and defraud his creditors, and particularly the plaintiff here.

BURNETT, J. On behalf of the plaintiff the only testimony about where the real ownership of the premises in dispute was vested came from the defendant husband, whom the plaintiff called as a witness. The plaintiff having thus vouched for his credibility, he testified very clearly that the money invested in the land was his wife's separate property, coming to her from the estate of her former husband; that he himself did not invest anything whatever therein; that, without his wife's knowledge or consent, he took the title of the property in the names of them both; and that as soon as the fact came to her notice she demanded of him a reconveyance of the property to her in severalty. To contradict him, although he was the plaintiff's own witness, an attorney of a bonding company was called by plaintiff, and, over the objection of defendant was allowed to testify, without producing the writing, that in an application made by Kelly and his part-

ner to the company for a building bond, in a transaction occurring long before the indebtedness in question arose, a statement in writing was made of the property of the applicants, in which it was set out that the defendant Kelly, the husband, was the owner of the tract in question. This property statement was not shown to have come to the knowledge of the wife, and was not signed by her, although she executed the building bond in connection with that statement. Even this was not proven, except by the attorney witness. No showing is made of any diligence to produce the original writing, or the bond which the defendant wife is said to have signed, except the statement of the witness that a few days before the trial he had forwarded them to the home office of the company in New York; hence the testimony on that subject was inadmissible under the rule laid down in Wiseman v. N. P. R. R. 20 Ore. 425 (68 Pac. 11, 1111; 93 Am. St. 748); Price v. Wolfer, 33 Ore. 15 (52 Pac. 759).

The decree in favor of the defendants was right, and must be affirmed.

MR. JUSTICE BEAN concurs in the result.

C., ST. L. & N. O. R. R. CO. v. BENEDICT'S AM'R.

154 Ky. 675. (1913)

CLAY, C. John Benedict, while riding in the caboose of a local freight train owned and operated by the Illinois Central Railroad Company, lessee of the Chicago, St. Louis & New Orleans Railroad Company, was killed by a collision between that train and a train approaching from the rear. His administrator brought this action against the two companies to recover damages for his death. The trial resulted in a verdict and judgment in his favor for $12,500. The railroad companies appeal.

During the progress of the conductor's examination he denied that the boy was on the train with his knowledge and consent. He was then asked if he had not told plaintiff, Mr. Benedict, on the Sunday after the accident near Ernest Reed's store that John was on his way to Fulton that day to get a job as flagman and that he (conductor) was trying to help him get that job, and was taking him to Fulton that day for that purpose. The conductor denied making the statement, and the evidence was received without objection. Later on plaintiff, Bene-

dict, was called and testified that the witness, at the time and place, made such a statement to him. This testimony was objected to, and it is earnestly insisted that the court erred in permitting it to go to the jury. It is true, as argued by counsel for defendants, that the statement is not a part of the *res gestae*. It is equally true that it is the general rule that admissions or declarations of an agent made after the completion of the transaction are not admissible against the principal, but in the present case the question was: Was decedent on the train with the knowledge and consent of the conductor? The conductor repeatedly stated that the decedent was not on the train with his knowledge and consent. Whether or not he was there with his knowledge and consent was not a collateral fact, but one of the main facts in issue. Having denied knowledge and consent, it was competent to show statements to the contrary for purposes of impeachment. The evidence complained of was of this character, and the court admonished the jury that the admitted evidence was not substantive evidence and had no bearing on the merits of the case, but that the jury should consider it only as affecting the credibility of the conductor. With this admonition the evidence was clearly admissible.

While the engineer in charge of the colliding engine was on the stand, he stated that the air pumps of the engine were defective. He was asked if he had notice of the condition of the air pumps. He stated that he had, and was then asked where he got the notice. He stated that he had gotten it from a report made by the engineer handling the engine just before the accident, and filed in the round-house at Mounds, Illinois. The further question was asked: "What did that report state with reference to that engine?" Over the objections of the defendants, the witness was permitted to state that the air pump was in a bad condition, and did not make enough air to supply the train. In this connection it is insisted that there was a failure to show that the record in question was made in the regular course of business, and a failure to introduce the person making the record. It is also insisted that it was not proper to introduce secondary evidence of the record. In answer to the last objection the record discloses the fact that several days prior to the trial a written notice was served on the defendants asking them to produce the record in question, and a rule was also asked requiring them to do so. The defendants failed to produce the record. If, then, the record was competent at all, oral evidence of its contents was certainly admissible. We do not think that the record in question is to be considered in the same light as entries in books. One of the material questions in the case was, Was the

engine in a defective condition, and if so, was this condition known to the defendants and their agents, or could it have been known by them by the exercise of ordinary care We think the evidence was competent as bearing on the question of notice. It is true that after the report was filed, the engine could have been repaired. This fact, however, does not render such evidence inadmissible. Having shown that the engine was in a defective condition, and that this fact was brought home to the defendants and their agents, the defendants could still show that the engine was repaired and that the alleged defective condition did not exist at the time of the accident.

Judgment affirmed.

EDWARDS v. TRACY.

62 Pa. St. 376. (1869)

SHARSWOOD, J. The defendants were sued in the court below as partners. Daniel Tracy, George H. Benton and Edward B. Beebe were in business under the firm name of Tracy, Benton & Co. The goods of the plaintiffs were sold and delivered to them.

The plaintiffs offered to prove the declarations of Daniel Tracy, one of the defendants, that Vandervier and Thorn were members of the firm of Tracy, Benton & Co., not in the presence of either Vandervier or Thorn, to be followed by acts and declarations of Vandervier and Thorn, or one or either of them, to the same effect. This offer was rejected by the court, an exception was taken by the plaintiffs, and it forms the subject of the 1st assignment of errors.

The declarations of a party to the suit as to the existence of a partnership are unquestionably competent to prove him to have been a member of the alleged firm, and who were admitted by him to have been the persons composing it. Such declarations are not, however, competent evidence against the others, and it is the duty of the court so to instruct the jury. Taylor v. Henderson, 17 S. & R. 453; Johnston v. Warden, 3 Watts 101; Haughey v. Strickler, 2 W. & S. 411; Lenhart v. Allen, 8 Casey 312; Bowers v. Still, 13 Wright 65; Crossgrove v. Himmelrich, 4 P. F. Smith 203. The same rule has been applied to the admissions of a defendant not served with process, and not, therefore, a party to the issue: Porter v. Wilson, 1 Harris 641. The objection taken below was that the acts and declarations of Van-

dervier and Thorn should have been first given in evidence to charge them; but it is plain that the same objection would have been equally good against their separate declarations to connect the others with them. The acts or declarations of each must, in the nature of things, be given in evidence separately and successively; otherwise, nothing of the kind would be available but a joint declaration by all together. Practically, it would exclude all such evidence. If A admits that he is a partner with B and B admits that he is a partner with A, it is evidence of a partnership as to both: Drennen v. House, 5 Wright 30, and it matters not which declaration is first offered. Nor does the fact that there was an agreement in writing between the defendants prevent the admission of this species of testimony. This was expressly so held in Widdifield v. Widdifield, 2 Binney 245. "Might not evidence be given," asks Chief Justice Tilghman, "of their confession of a general partnership subsequent to the articles, or of their acting in such a manner as was inconsistent with anything but a general partnership? How are the world to know anything about the instruments of writing made in secret between persons in trade?" We think there was error, therefore, in the rejection of this offer.

The 2nd error assigned is in rejecting a letter written by Daniel Tracy to third persons for the purpose of showing a partnership with Vandervier and Thorn. But this letter, or a copy of it, should have been attached to the bill of exceptions by a *pro ut*, in order to enable this court to see whether it did tend to show that for which it was offered: Stafford v. Stafford, 3 Casey 144; Gratz v. Gratz, 4 Rawle 411; Rice v. Groff, 8 P. F. Smith 116. It is true that this is not the reason stated by the learned judge for the rejection; but as Mr. Justice Kennedy remarks in Gratz v. Gratz, it would not be right to test the admissibility of evidence by the insufficiency of the reason assigned by the court below for rejecting it. A right judgment is not to be reversed on account of a wrong reason given for rendering it.

Reversed.

PETERS & ROBERTS FURNITURE CO. v. QUEEN CITY INS. CO.

63 Ore. 382. (1912)

This is an action by the Peters & Roberts Furniture Company, a corporation, against the Queen City Fire Insurance Company, of

Sioux Falls, South Dakota, a corporation, to recover on a fire insurance policy. The cause was tried before a jury, resulting in a verdict and judgment in favor of plaintiff for $2,406.61, from which defendant appeals.

BEAN, J. The bill of exceptions also discloses that counsel for plaintiff objected to the introduction of evidence tending to show that the policy of insurance was issued on the condition that the Spring Garden policy should be canceled, and on the further condition that the policy spoke for itself, and could not be contradicted by parol testimony. The policy was introduced in evidence by plaintiff, and contains the clause, "Other concurrent insurance permitted." The policy does not purport to limit the amount of such concurrent insurance, and we think the testimony in regard to the cancellation of the Spring Garden policy was in direct contradiction to the terms of the policy in suit. Neither does the policy contain any clause or condition that it should be approved by one W. E. Thomas, or any third person. We think that the testimony offered, tending to show that Mr. Thomas had not approved the policy, was incompetent, under the familiar rule, that, where parties have plainly reduced their contract to writing, all the terms and conditions thereof will be presumed to be included in the memorandum.

The defendant also assigns as error the ruling of the court in receiving secondary evidence of the contents of the proof of loss without producing the original. It is shown by the evidence that the originals of these documents were in the possession of defendant at the company's home office in South Dakota. Defendant claims that the notice to produce the same did not allow sufficient time to do so. Under Section 782, L. O. L. a party is permitted to introduce secondary evidence of a writing which is in the custody of the adverse party, if he fails to produce the same after reasonable notice to do so. It has been held that where it is apparent from the face of the pleadings that a writing in the custody of one party will be required at the trial of the cause, by the other party, the pleadings themselves are sufficient notice to that party to produce the document at the trial, and, if he fails to do so, secondary evidence as to its contents is admissible. Wigmore, Evidence, sec. 1305; Continental Life Ins. Co. v. Rogers, 119 Ill. 474 (10 N. E. 242; 59 Am. Rep. 810); Zipp v. Colchester Rubber Co., 12 S. D. (80 N. W. 367). It was but a reasonable expectation that, when the action was brought against the defendant upon the policy the officers of the company would have the documents relating to the issues, at the place of trial, so that the same might be produced upon two

or three days notice. We cannot say that there was prejudicial error in this ruling.

The defendant also assigns as error the receiving of secondary evidence of the contents of two policies of concurrent insurance, without producing the originals. It is shown by the testimony of the local agents of the insurance companies, whose policies were sought to be produced, that the originals were in London, England, and in Philadelphia, Pa. Both plaintiff and defendant in this case allege that there was other concurrent insurance upon the property covered by the policy in question. In ascertaining the amount, both parties were interested. Under such circumstances, a showing that the writing is outside of the State should be a sufficient excuse for the nonproduction of the original documents to permit secondary evidence. Mr. Justice BEAN in Wiseman v. N. P. R. R. Co., 20 Ore. 425, at page 429 (26 Pac. 272, at page 274; 23 Am. St. Rep. 135), says:

"The degree of diligence which shall be considered necessary, in any case will depend upon the character and importance of the document, the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be supposed to be found. If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter."

The evidence of the contents of these policies was offered upon a collateral question in which both parties were interested. Therefore, under such circumstances, secondary evidence of their contents was admissible upon the showing of diligence made. These last two questions were peculiarly for the trial judge to finally determine. Wigmore, Evidence, sec. 1253.

It does not appear that the admission of this testimony was injurious to any substantial right of defendant, and therefore does not amount to reversible error in any event. Koshland v. Hartford Ins. Co., 31 Or. 402 (49 Pac. 866); Krewson v. Purdo, 15 Or. 589 (16 Pac. 480); Hudson v. Goodale, 22 Or. 68, 73 (29 Pac. 70).

Affirmed.

HOLLOMAN v. SOUTHERN RY. CO.

172 N. C. 372. (1916)

The action was brought for the recovery of certain knitting mill machinery which was shipped from Raleigh, N. C., to the plaintiff at Kernersville, N. C. When the machinery arrived at Kernersville it was found to be in a damaged condition, and plaintiff refused to receive it, according to plaintiff's version of the facts, unless the defendant would take a qualified receipt for it, showing its bad condition, which defendant declined to do. The machinery was, therefore, placed in defendant's warehouse. Plaintiff brought suit in Guilford Superior Court to recover damages for the injury to the machinery, and got a judgment for $1,500.

WALKER, J., after stating the case: The plaintiff, in brief, states his contention as follows:

"The judgment in this case is clearly erroneous in adjudging that the defendant is entitled to recover storage charges, because:

"1. The defendant's right to recover storage charges is dependent upon notice of the arrival of the shipment in accordance with the rules of the Corporation Commission; and there was no competent evidence to prove such notice.

"2. The defendant was estopped from asserting the right to claim storage charges.

"3. The court decided as a matter of law that the right to charge storage had not been waived."

We are of the opinion that none of these several contentions should prevail. There was ample evidence that notice of the arrival of the machinery was properly given. This was done by postal card properly addressed and mailed and presumed to have been received by the plaintiff, in the absence of evidence that it was not. Model Mill Co. v. Webb, 164 N. C. 87; Trust Co. v. Bank, 166 N. C. 112. It has been held that where the consignee has actual notice that the goods have arrived and that the carrier is ready to deliver them at his depot, it dispenses with any formal written notice of the fact; nor could he demand it, 4 R. C. L., p. 755; Normile v. N. P. Railroad Co., 67 L. R. A., 271; but we do not decide as to this view, as we have held that sufficient notice was given. Plaintiff objected to oral evidence in regard to mailing the postal card announcing the arrival of the machinery; but this position is not tenable, as the mailing and contents of the postal card are matters collateral to the issue and not the sub-

ject-matter of the litigation. It was held in Ledford v. Emerson, 138 N. C. 502, that the rule excluding parol evidence as to the contents of a written instrument applies only in actions between parties to the writing, when the enforcement of any obligation created by it is substantially the cause of action. 1 Greenleaf on Ev., 275, 279; Pollock v. Wilcox, 69 N. C. 50; Reynolds v. Magness, 24 N. C. 26; Carden v. McConnell, 116 N. C. 875; Belding v. Archer, 131 N. C. 287; S. v. Credile, 91 N. C. 640; Jones v. Call, 93 N. C. 170. The last two cases related to notices, and it was there held that the rule requiring the production of the writing itself as the best proof of what it contains does not extend to mere notices, which persons are not expected to keep. 1 Greenleaf on Ev., sec. 561.

There was no error in the rulings of the court.

BUTLER v. MAIL & EXPRESS PUB. CO.

171 N. Y. 208. (1902)

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 14, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

CULLEN, J. The complaint alleges that on twenty-nine different occasions the defendant, in consideration of one hundred dollars paid to it by the plaintiff, agreed to give him a hundred dollars worth of advertising in a paper published in New York City known as the Mail and Express; that the defendant thereafter refused to do any advertising for the plaintiff or to return to him the money so paid; and judgment was demanded for the recovery of the sum of $2,900, with interest. The defendant answered alleging that the sums paid by the plaintiff were paid, not in consideration of advertising thereafter to be furnished, but in satisfaction of a judgment that the defendant had recovered against the plaintiff.

At the close of the evidence the defendant moved to dismiss the complaint on the ground that the alleged agreement to give the plaintiff advertising space was without consideration. The motion was denied and the defendant excepted. The trial court submitted four questions of fact to the jury, the first of which was: "Was there an agreement of compromise between the plaintiff and the defendant by which it

was agreed that if the plaintiff would pay the amount included in the judgment, the defendant would, as the payments were made, issue due bills for advertising for the different amounts paid?" The others related to the payments by the plaintiff, the issue by the defendant of the due bills for advertising and the defendant's refusal to perform, all of which were found in favor of the plaintiff. Thereupon the court directed a general verdict for the plaintiff. The judgment entered on that verdict was unanimously affirmed by the Appellate Division and an appeal from such affirmance taken to this court.

The unanimous affirmance below precludes us from passing upon the appellant's exceptions to the denial by the trial court of the motion to dismiss the complaint. Nor is the interesting question whether the special findings of the jury were sufficient to authorize the direction of a general verdict by the trial court presented to us, because the record shows no exception to that direction. There is, however, an exception to the admission of evidence which we deem fatal to the judgment. The plaintiff, against the objection and over the exception of the defendant, was allowed to testify to the contents of an alleged written stipulation by which he was to be permitted to pay the defendant's claim at the rate of $500 a month, either in money or by furnishing advertising to that amount. The making of such a stipulation was denied by the defendant. The plaintiff testified that he had last seen the stipulation with Messrs. Ormiston & Dorset, his attorneys in the action against him. He stated that the attorneys had promised to send it to him if they found it, but no evidence was produced to show that the stipulation had been lost or that at the time of the trial it was not in the possession of Ormiston & Dorset and could not be produced. We do not see that there is any thing to be said in defense of the ruling by which this testimony was admitted.

The judgment appealed from should be reversed, and new trial granted, costs to abide the event.

GROCERY CO. v. BRADFORD.

70 W. Va. 496. (1912)

Action by the Star Grocery Company against W. Bradford and another. Judgment for plaintiff, and defendants bring error.

POFFENBARGER, J. The bond constituting the basis of this action

and given by a traveling salesman to secure faithful performance of his written contract with his principal, contains, in the obligatory clause thereof, the name of the salesman, described as principal, and the condition recites his employment, his duty to collect accounts for his employer and the existence of an article of agreement between them, giving its date, but is signed by the two defendants herein only as sureties.

Wilson defaulted and left the country. His successor as salesman for the territory he had traveled called upon the customers of his employer and obtained from them evidence of the collections made by Wilson in the form of invoices receipted by him and checks in payment of invoices, made payable to his employer and collected by him after his endorsement of his employer's name by him as agent. These receipted invoices and checks were admitted as evidence of liability on the bond. A statement in the handwriting of Wilson, showing a balance against him of $460.75, for which he gave his check, together with the protested check, were also introduced as evidence, supplemented by proof of lack of funds in the bank on which the check was drawn to pay it. In one instance, the customer testified to the payment of a bill not accounted for by Wilson. In all the instances in which checks appeared to have been given and endorsements made by Wilson, his hand writing was proved. In addition to this evidence, the bookkeeper of the employer, with the books in his possession and at hand, testified to the delivery and shipment of all the goods, the purchase money of which was shown to have been collected as aforesaid. Admissibility and sufficiency of this evidence are challenged on account of its alleged secondary character. It is unnecessary to enter upon an inquiry as to the classification of evidence referred to in the brief. The receipts, checks and statement in the handwriting of the principal constitute admissions by him, made within the period of his employment and in the course thereof, and are admissible against the sureties, according to all authority and sufficient, in the absence of any contradiction thereof, to fix liability upon them. "Accounts, entries and written statements by the principal are prima facie evidence against his sureties, in some states being conclusive." 32 Cyc. 137. See also Brandt on Suretyship, secs. 798-800; 1 Greenleaf Ev., secs. 187, 188. To the admission in argument of the admissibility of this evidence against Wilson, if he were a party, we add these authorities, conclusively showing it to be likewise admissible against its sureties. Clearly admissible, covering the full amount of the recovery and wholly uncontradicted it precludes any possible verdict, other than the one rendered, and

therefore, the error, if any, in admitting the testimony of the bookkeeper as to the delivery of the goods was obviously harmless. Hence there is no occasion for inquiry as to its admissibility.

The testimony of McConnanghey, president of the plaintiff company, was objected to for lack of documentary proof of his position as president. According to well settled practice, his own evidence as to that was sufficient to establish it *prima facie,* because the fact was collateral in character. His office in the corporation was not in issue. The sole purpose of proof of his position was to show how or why he had done certain things and possessed certain knowledge. To establish such a status for such purpose, the highest and best evidence is not required. Generally, it is conceded. In qualifying experts, physicians and lawyers are not required to produce their licenses. Their oral testimony suffices everywhere.

Affirmed.

DICKINSON v. WHITE.

25 N. Dak. 523. (1913)

FISK, J. The city of Dickinson sues to recover against J. S. White, its ex-city treasurer, and against his surety, the Northern Trust Company, upon certain official bonds given by the said White as such city treasurer, it being plaintiff's contention that the said White defaulted and failed to account for city funds collected and received by him in his said official capacity.

The defendant White was not served with process, and made no appearance in the action, and the Northern Trust Company alone appeals.

A jury was waived and the cause tried to the court, resulting in findings and conclusions favorable to the plaintiff on the second and third causes of action, but holding that the first cause of action was, at the time this action was commenced, barred by the statute of limitations.

To prove the alleged shortage under the second count, plaintiff offered in evidence Exhibit 9, purporting to be a report of J. S. White to the city council for March, 1908, and Exhibit 13 which purports to be a receipt by White to the county treasurer, dated March 31, 1908, for taxes.

To prove the alleged shortage under the third count, plaintiff offered

in evidence Exhibit 10 purporting to be a report by White to the city council for February, 1909, and Exhibit 14, which purports to be a receipt by White to the county treasurer dated February 23, 1909. Also under the third count plaintiff offered in evidence Exhibit 15, purporting to be a warrant for $2,150, the slip showing its deposit to the credit of J. S. White, city treasurer, marked 19, the debit slip of the bank marked Exhibit 20, and the page of the cash book of the city marked Exhibit 21, all of which were objected to. Exhibits 20 and 21 were made February 10, 1910. White ceased to act as city treasurer December 16, 1909.

The purported reports of White to the city council, Exhibits 9 and 10, were received in evidence over objection that they were incompetent, not the best evidence, and shown to be mere copies. The books of the city or of White were not produced in court nor offered in evidence. The purported receipts to the county treasurer, Exhibits 13 and 14, were received in evidence over objection that they were incompetent, and no proper foundation laid.

Assignments numbered 1, 2 and 12 relate to certain rulings of the trial court admitting in evidence Exhibits 9, 10, 13, and 14. This proof was offered for the purpose of proving the default of $645.11 alleged in the second cause of action, and the default of $909.88 alleged in the third cause of action. Exhibits 13 and 14 are receipts given by White as city treasurer to the county treasurer for moneys received by the former from the latter. White signed such receipts, and they were shown to be records in the office of the county treasurer.

These receipts furnish *prima facie* evidence of the fact that White as city treasurer, received from the county treasurer the amounts therein mentioned. Rev. Codes 1905, secs. 7298 and 7299. It was White's duty to give receipts for moneys thus received.

Section 2711, Rev. Codes 1905. Appellant's counsel does not controvert the correctness of the above proposition; but they contend that this was not the propr method of proving the alleged shortages. Plaintiff, after introducing the above receipts, offered in evidence Exhibits 9 and 10, which consist of reports made by White, as city treasurer, to the mayor and city council of Dickinson on March 31, 1908, and on February 27, 1909, purporting to show the receipts and disbursements made by him as such city treasurer for the months of March 1908, and February, 1909, respectively, and in which reports White accounts and reports for the sum of only $5,640 for moneys received from the county treasurer for taxes in March, 1908, whereas Exhibit 13 shows that he received $6,285.11 making a difference of $645.11 as found by

the trial court in its fifth finding of fact; and, by Exhibit 10 he accounts for and reports as having received from the county treasurer the sum of only $67.20, whereas by the receipt Exhibit 14 he admits that he received $909.88, making a difference of $842.68. Counsel for appellant urge that this method of proving shortages is improper, and that plaintiff should have shown the total amount of money received and expended by White during the terms of the bonds, or either of them and they emphasize the fact that there was no proof offered as to what amount White had paid over and accounted for to his successor in office, nor of the amount for which he thus should have paid out and accounted for, and that the books of the city were not offered in evidence or produced in court for the purpose of showing these facts. They also contend that Exhibits 9 and 10 were improperly received in evidence, as they were not the original records, and were incompetent, and not the best evidence, and no foundation had been laid for their introduction. We think appellant's contentions are untenable. The proof offered by the plaintiff, in the absence of any showing to the contrary, constituted *prima facie* evidence that White had not accounted for the moneys thus received by him as shown by said Exhibits 13 and 14, and that there were, therefore, shortages in the sums above mentioned. While the method of proof suggested by appellant's counsel of establishing such alleged shortages would be proper and perhaps preferable, such method is not the sole and only method of proving such facts, and it was perfectly proper for plaintiff to show that White had receipted for specific moneys belonging to the city, and had reported to the mayor and city council lesser amounts than those for which he had thus receipted. As before stated, in the absence of proof to the contrary, this constituted *prima facie* evidence of the existence of shortages and the amount thereof; and if such shortages had been subsequently made up or adjusted, such fact could have been shown by the defendant.

Sufficient foundation for the introduction of all of the Exhibits aforesaid was laid by the testimony of White, who identified all of such Exhibits as the receipts and reports made and signed by him, and that the difference in the amounts received, and reported as having been received, has never been made up. Exhibits 9 and 10 are the original reports made by White, as city treasurer, and the objections to their introduction in evidence are clearly untenable. The fact that in making such reports the data therefor were taken or copied from the books kept by him as city treasurer does not render them inad-

missible as secondary evidence. They were made pursuant to official duty, and were originals, and not mere copies.

Reversed on another ground.

PRINGEY v. GUSS.

16 Okla. 82. (1905)

BURWELL, J. This is an action by the plaintiffs in error against U. C. Guss to declare a resulting trust; it being the contention of the appellants that the appellee purchased the s. e. ¼ of sec. 9, twp. 15, n. of r. 5 east in Lincoln county, Oklahoma, from J. E. Ross, the former owner of the legal title with full knowledge that he had, prior thereto, sold it to these appellants and received a part of the purchase price therefor. The contract of sale under which appellants' claim was signed in duplicate by Joseph C. Pringey, and Mrs. Ida Ross (wife of J. E. Ross), and sent to J. E. Ross for his signature. Pringey never received either of them, but he contends that he received letters from J. E. Ross accepting the terms of the contract, and that he is bound thereby; but the letters received by Pringey and offered in evidence do not alone constitute a sale of the land. It is impossible to determine from them what the terms of sale were; hence the absolute necessity on the part of the appellants to prove the contract of sale. The evidence clearly showed that the original contracts were last in the possession of J. E. Ross who lived at Genoa, Nebraska; and because Ross lived outside of Oklahoma Territory, the appellants sought to introduce a carbon copy of the contracts without any showing of diligence to procure the originals or one of them. The trial court excluded the carbon copy, and finally, when the appellants rested, a demurrer was sustained to the evidence and the cause dismissed at plaintiffs' cost. In both of these rulings the court was correct. Without proving the contract, the plaintiffs could not recover, and they could not use an unsigned carbon copy without first showing diligence to procure the original.

We do not contend that, where a written instrument is only collaterally involved, and the original is in the possession of another in a different state, in no circumstances can secondary evidence be admitted to prove its contents; but where a party can only recover under a contract, that is, where the contract itself is directly involved, secondary

evidence will not be received, until it be first shown that the original is lost, or beyond the control of the party wishing to prove its content; and the Supreme Court of the United States, in the case of Turner v. Yates, 16 Howard 26, clearly adopted this rule.

It is true that there are authorities to the contrary, but the rule herein announced appeals more strongly to our view of what the law ought to be, and we find it supported not only by the Supreme Court of the United States but by other courts of high standing. John Kearney v. The Mayor of the City of New York, 92 N. Y. 617; Shaw v. Mason, 10 Kan. 184; Dickenson v. Breeden, 25 Ill. 167; McGregor v. Montgomery, 4 Penn. St. 237; Londoner et al. v. Stewart, 3 Colo. 47; Wood v. Cullen, 13 Minn. 394.

The contract not having been proved, the evidence introduced upon the trial was not sufficient to support a judgment in favor of the plaintiffs, and the demurrer to their evidence was properly sustained.

The judgment of the lower court is hereby affirmed, at the cost of appellants.

YOUNG v. THE PEOPLE.

221 Ill. 51. (1906)

HAND, J. The first contention of plaintiffs in error is that the evidence is not sufficient to sustain a conviction. Greear admits that he formed a conspiracy with Keefe and McCormick to defraud the bookmakers in Chicago, and Young is a confessed gambler. The jury saw and heard them and the witnesses produced by them testify, and while the direct evidence that Young was connected with McCormick and Keefe is very meager, in view of all the circumstances proven on the trial, if no error of law had been committed during the trial we would not reverse the case on the ground that the evidence was not sufficient to sustain the verdict. The only evidence tending to connect Young with McCormick and Keefe, and to show a conspiracy between Young McCormick and Keefe to work the confidence game upon Greear, other than Greear's testimony, was certain evidence in writing of which secondary evidence was admitted upon the trial in the place of the original written evidence, and this secondary evidence, it is claimed by plaintiffs in error, was admitted without a proper foundation being

laid for its admission, and that the admission of such secondary evidence constitutes reversible error.

Greear testified that while in Minneapolis, Keefe showed him two letters purporting to be written to Keefs by McCormick, in one of which McCormick said he wanted Keefe to get a good, honest man with money to go to Chicago and make "sure thing" bets on horse races. When asked where the letter was, he said Keefe destroyed it. He afterwards said Keefe destroyed one letter, and afterwards said Keefe destroyed the letter other than the one containing the statements above referred to. His testimony, when taken as a whole, clearly showed that the last time he saw the letter, if he ever saw such a letter, it was in the possession of Keefe. Objection was made to the admission of parol proof of the contents of said letter on the ground that the evidence showed the letter was in the possession of Keefe when last seen by the witness and that Keefe had not been notified to produce the letter upon the trial. The general rule is, that parol evidence cannot be received of the contents of a writing unless a proper foundation has been laid for its admission by notifying the party in whose possession the writing is, to produce it upon the trial or by showing that it has been lost or destroyed. No such foundation was here laid with reference to this letter, and the court erred in permitting parol proof of its contents. Holbrook v. Trustees of Schiils, 22 Ill. 539; Wright v. Raftree, 181 id. 464.

The court also permitted the State to introduce in evidence a copy of a telegram purporting to have been sent by Keefe from Mankato, Wis., June 13, 1905, to Fred Gondorf (McCormick) at Chicago, requesting Gondorf (McCormick) to meet Keefe the next day at 10:30 at the Majestic Hotel, without proof of the loss of the original telegram or even that the copy offered was a copy of the original. The copy introduced was the copy retained by the telegraph company among its files in its Chicago office, and the court seems to have entertained the view that such copy was the original. This was not the correct view. It was not shown that Fred Gondorf (McCormick) ever received said telegram, or that it was ever acted upon by either Keefe, McCormick or Young, or that it was signed or sent by Keefe. It was introduced as the admission of Keefe that he knew McCormick and desired to have him meet him. In order to bind Keefe it was necessary to show he signed or sent the telegram or that he acted on the telegram after it was received, and the best evidence of the contents of the telegram was the original telegram filed at Mankato, Wis. (Mat-

teson v. Noyes, 25 Ill. 481; Morgan v. People, 59 id. 58.) It was error to admit in evidence the copy of said telegram.

When Keefe was arrested, a card was taken from his vest pocket upon which was written, "L. Y., 3030 Indiana avenue, phone Douglas 2685," which were the initials of Louis Young, the number of his residence and the telephone number. The police officer who received the card from the officer who took it from Keefe testified that the last time he saw it, which was four or five days before the trial, he gave it to the assistant State's attorney. Young testified he had never seen the card, knew nothing of its contents or how Keefe came by it. The court, without requiring the production of the card by the assistant State's attorney or proof of its loss or destruction, over the objection of the plaintiffs in error, permitted the police officers to state what was written on the card at the time it was taken from Keefe. This evidence was exceedingly damaging to Young as it tended to connect Keefe with him, and it was error to admit parol proof of what was written on the card without proof of the loss or destruction of the card. Mariner v. Saunders, 5 Gilm. 113; Whitehall v. Smith, 24 Ill. 166; Wing v. Sherrer, 77 id. 200; Williams v. Case, 79 id. 356

For the errors of the court in admitting in evidence the copy of said telegram and parol proof of the contents of said letter and the matter written upon said card without the proper foundation having been laid for the admission of secondary evidence, the judgment of the Criminal Court will be reversed and the cause remanded to that court for a new trial.

Reversed and remanded.

WILSON v. WRIGHT.

8 Utah 215. (1892)

ZANE, C. J. This action was brought to recover the unpaid remainder of the price of plaintiff's interest in certain mining claims sold to the defendant. The respondent testified that he sold and conveyed his interest to the defendant on the 27th of October, 1888; that the defendant at that time paid him $1,500, and agreed to pay $1,000 more when he should sell the claims or find ore in them; that defendant did find ore and sold the claims for the sum of $10,000. The defendant testified that he paid the $1,500 at the time of the sale as the sole con-

sideration, and that he did not agree to pay any other or further consideration. Some time after the $1,500 was paid, the defendant made three different payments to plaintiff, amounting to $300. The plaintiff states that these were made upon the $1,000. But the defendant says they were not so paid; that the money was given to plaintiff at his request and for his accommodation. While there is a conflict in the evidence as to the agreement to pay the additional $1,000, we are of the opinion that the weight supports the finding of the jury, which was for the plaintiff for $700, that being the remainder of the $1,000 after deducting the $300. On the trial of the cause the defendant testified that he thought the plaintiff's deed to him for the property was left with one Jones, to whom witness sold; that he had made diligent search for it, and that it was not in witness' possession or control. On this preliminary proof defendant's counsel offered a copy of the deed in evidence duly certified by the records, to prove that the consideration for the property was $1,500, that being the amount mentioned in the deed. To the admission of the copy in evidence the plaintiff objected, on the ground that the preliminary proof did not show sufficient diligence to find and produce the original. The court sustained the objection, and the defendant excepted, and assigns the ruling of the court as error. The consideration named in the deed being $1,500, it would have corroborated the defendant's testimony, had it been admitted in evidence. The general rule with respect to secondary evidence is "that it is inadmissible until it be shown that the production of primary evidence is out of the party's power." The party offering secondary evidence must give some reasonable excuse for the absence of the primary. If the primary evidence is a document, its destruction or loss must be shown by at least presumptive evidence. The party must show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him or that it was out of his power to produce the document. "When the document belongs to the personal custody of a particular individual, or is proved or may be presumed to be in his possession, he must in general be served with a subpoena *duces tecum*, and be sworn to account for it." 1 Taylor Ev., pp. 396, 397. 1 Greenl. Ev. sec. 558. To these general rules there are exceptions. In the trial of title to land the rule in the United States when not changed by statute, is: "It being the general practice in the United States for the grantor to retain his own title deeds, instead of delivering them over to the grantee, the grantee is not held bound to produce them; but the person making the title to

lands is in general permitted to read certified copies from the register of all deeds and instruments under which he claims, and to which he is not himself a party, and of which he is not supposed to have the control." Assuming that this rule is applicable in all cases to the admissibility of copies of title deeds certified by the recorder, it does not apply to the case in hand. This defendant is a party to the original deed, and he has the right to its possession. 1 Greenl. Ev. (4th ed.) sec. 665, note 6; Eaton v. Campbell, 7 Pick. 10; Scanlan v. Wright, 13 Pick. 523; Woodman v. Coolbroth, 7 Me. 181. Reference is made to 2 Comp. Laws Utah, 1888, sec. 2617: "That when any such conveyance or instrument acknowledged or proved, certified and recorded in the manner prescribed by this act, and it shall be shown to the court that such conveyance or instrument is lost, or not within the control of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence without further proof." The preliminary proof does not show that the original deed of which the defendant offered the copy was lost or destroyed. The defendant states that he thought it was left with Mr. Jones, who was at the time of the trial in the city in which the trial was had, and it did not appear that inquiry was made of him at any time. The defendant being the grantee in the deed, he was entitled to its possession, as we have seen; if he left it with Mr. Jones, presumably he could have obtained it from him by asking him for it. If a party has the legal right to the possession of a document, in a legal sense it is within his control, though he may have left it with an agent or other person, from whom he has a right to receive it by demanding its possession. The defendant should have inquired of Jones for the deed, and if in his possession should have requested the possession or the use of it, and if such request had been refused the defendant could have said that it was not within his control. We hold that the ruling of the court excluding the copy was not error. We find no error in this record, and therefore the judgment of the court below is affirmed.

ANDERSON, J., and MINER, J., concurred.

PITT v. EMMONS.

92 Mich. 542. (1892)

MONTGOMERY, J. The plaintiffs are dealers in grain at Baltimore, and the defendants conduct a similar business at Detroit. In September, 1888, the plaintiffs purchased of the defendants by sample 15 cars of wheat to be delivered. Four cars were delivered, which plaintiffs claim were not equal to sample, and the plaintiffs thereupon refusing to accept more of similar wheat as answering the terms of the contract, and the defendant refusing to ship the wheat of the grade claimed by plaintiffs, no more was shipped. This action is brought to recover damages for the alleged failure to fulfill the contract, both because the quality of the wheat was not up to grade, as well as for the failure to deliver the remaining 11 cars of the quality contracted. The evidence tended to show that the plaintiffs would have realized a considerable profit on the wheat if delivered, and of the quality claimed by them to have been purchased.

The dispute arises over the question of what in fact was the sample with reference to which the contract was made. Considerable correspondence passed between the parties.

The defendants offered in evidence an alleged copy of a postal card claimed to have been sent by them to plaintiffs on the 8th, stating that a sample of wheat had been sent marked "3". It is evident that this postal was of exceeding importance, for if in fact there was such a sample in plaintiffs' hands when the telegrams passed between the parties the jury would have been justified in finding that the contract called for the quality of wheat in this last-named sample. The plaintiffs' testimony had been taken by deposition, and the plaintiffs' office was at Baltimore, and the only notice calling for the production of this postal card was served on the same day the copy was received in evidence, against the plaintiffs' objection. The plaintiffs' attorneys disclaimed any knowledge of the postal card. Under the circumstances, it was error to admit a copy. Furgeson v. Hemingway, 38 Mich. 159; Julius King Optical Co. v. Treat, 72 id. 599; Mortlock v. Williams, 76 id. 568.

The judgment will be reversed, with costs, and a new trial ordered.

McDONALD v. ERBES.

231 Ill. 295. (1907)

HAND, J. This was an action of assumpsit commenced by the appellee, against the appellant, in the Circuit Court of Vermilion County. The declaration consisted of the common counts, and the general issue was filed, and the trial resulted in a verdict and judgment in favor of the appellee for $2,923.75, which judgment has been affirmed by the Appellate Court for the Third District.

The judgment, in part, was made up of an item of $900, which was paid by the appellee to E. H. Steiger. The appellee contended said item of $900 was paid to Steiger by him at the request of appellant, and the appellant contended it was paid to Steiger by the appellee for his own benefit. In order to establish his contention the appellant offered in evidence a copy of a written agreement alleged to have been entered into between the appellant and appellee, which, upon the objection of appellee, the court refused to admit, on the ground that no sufficient foundation had been laid for the admission of secondary evidence of the contents of said agreement, and the refusal of the court to admit in evidence a copy of said agreement in lieu of the original is the sole ground of reversal relied upon in this court.

As a foundation for the admission of a copy of said agreement in evidence in lieu of the original, the appellant showed that at the time the agreement was executed it was left in the possession of Steiger, who resided at Oshkosh, Wisconsin, and that it has never been in the possession of either of the parties to the suit, and Steiger testified that if he had the agreement it was at his home in Oshkosh. No effort was made by the appellant to obtain the original agreement prior to the trial, it being his contention that as it appeared the original was beyond the jurisdiction of the court and in the hands of a third party, the copy thereof was admissible in evidence. The authorities are not in entire harmony upon the question at issue between the parties to this suit. In some jurisdictions the rule is, that where it appears that an instrument in writing is beyond the jurisdiction of the court and in the hands of a third party a copy thereof may be introduced in evidence in lieu of the original; while in other jurisdictions the rule is, that a copy cannot be admitted in evidence in lieu of the original unless it appears, in addition to the facts that the original is beyond the jurisdiction of the court and in the hands of a third party, and that due effort had been made by the party offering the copy to obtain the

original. (2 Elliott on Evidence, secs. 1469, 1470; 25 Am. & Eng. Encyc. of L.—2nd ed.—p. 171.) The rule in force in this State, as announced in Dickison v. Breeden, 25 Ill. 186, Fisher v. Greene, 95 id. 284, requires that due effort must be made by the party who offers a copy of a written instrument in evidence when the original is beyond the jurisdiction of the court and in the hands of a third party, to obtain the original before the copy will be received in evidence. In the Dickison case a copy of a deed was offered in evidence, which the proof, which was in the form of an affidavit, tended to show was in the hands of the plaintiff's grantor in the State of Indiana. The court held that the plaintiff should have taken the deposition of his grantor and not have relied upon a copy of the deed. In the Fisher case the party who held the original power of attorney resided in the State of New York, and upon his deposition being taken, refused upon request to attach the instrument to his deposition, and it was held that upon such refusal a sworn copy of the power of attorney annexed to the deposition of another witness was properly received in evidence. And in the Bishop case, on page 307, it was said: "Secondary evidence may be offered to prove the substance of a document which it is out of the power of the party to produce; and this rule applies to papers out of the jurisdiction of the court, provided due effort be made to obtain such papers."

We think the rule in force in this State the sounder one of the two rules above announced, as under the rule in force in Alabama and some other States it is only necessary to introduce proof that the deed, contract or other instrument in writing relied upon is in the hands of a third party outside of the state to entitle a copy thereof to be admitted in evidence. In the Dickison case, on page 187, it was said: "There is much danger in allowing the introduction of copies without fully establishing the fact of the existence, at some time, of an original and of its subsequent loss or destruction, so that after diligent search it could not be found. Justice and the safety of the people require a rigid rule to be applied and enforced in such cases." We think it clear the trial court followed the rule established in this State, and that it did not err in refusing to admit in evidence the copy of said agreement.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

COOMBS et al. v. COOK.

35 Okla. 326. (1912)

HAYES, J. Plaintiffs in error brought this action in the court below to quiet title to an undivided half interest in a certain tract of land consisting of 225 acres, situated in McCurtain county in this state, and to obtain a decree of partition.

The case was tried to the court without a jury. Before any evidence was heard, the following stipulation was made in open court:

"For the purposes of this trial, it is stipulated in open court between attorneys for the plaintiffs and the attorneys for Betsy Cook that the land in controversy was the allotment of Isabel O'Bannon, who was enrolled as a full-blooded Choctaw, and who died intestate in McCurtain county. It is further stipulated that the defendant Betsy Cook, formerly Betsy Durant, is enrolled opposite enrolment No. 2083 as a full-blood Choctaw, and said certificate is made a part of this stipulation. It is further stipulated that David James, Rachel James, and Margaret Keel have conveyed to the plaintiffs their interest in the land described in this petition, which interest depends on the ascertainment of the question of adoption in this case. It is further stipulated that the only issue of law and fact between the defendant, Betsy Cook and the plaintiffs is the fact and sufficiency of the adoption pleaded as a separate answer of Betsy Cook."

The trial court found the issues generally in favor of Betsy Cook and against the plaintiffs, and found specially that Isabel O'Bannon was a Choctaw Indian, and that in the year 1892 she adopted Betsy Cook, as alleged in her answer in accordance with the laws of the Choctaw nation; that she died in March, 1907, after having taken as her allotment the land in controversy; that she left surviving her as her kinsmen only the persons named in plaintiffs' petition; and that Betsy Cook, as her legally adopted child, is the sole and only heir to her estate, and rendered judgment in her favor accordingly, from which judgment only plaintiffs in error, plaintiffs below, prosecute this appeal.

All of defendant's evidence, by which the fact of her adoption was established, was parol evidence, made after proof that the records of the court in which the order of adoption was made had been destroyed. Plaintiffs rely for reversal of the cause upon four contentions: First, that the evidence fails to establish that there was ever a record in any court that had jurisdiction; second, that, if such record ever existed, the evidence does not establish that it is lost and cannot be found;

third, that the contents of such record has not been shown; fourth, that, if the evidence established an adoption under the laws of the Choctaw nation, the statutes of that nation, in so far as made part of the evidence at this trial, fail to show that an adoption of a child has the effect to confer upon it the right to inherit from the adopting parent. The first three of these contentions may be discussed together.

Defendant in error pleaded in her answer and proved the following tribal statute of the Choctaw nation:

"Any person or persons who may wish to adopt illegitimate or orphan child or children shall file a petition to that effect with the clerk of the county they may reside in, which shall remain on file for 30 days; and, if no legal or just cause is shown why the petition shall not be granted, then the county judge shall grant the petition and cause the same to be recorded in the county clerk's office, after which the adoption shall be as binding as if done by a special act of the general council."

Where under the provisions of the statute, an adoption is effected by an order of the court, the records of such court constitute the evidence by which such adoption may be established. Quinn v. Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

In the absence of proof of such order of adoption by the court, as provided by the statute, no presumption of adoption will arise from the fact that a child has lived with a person, who is not his parent, and has been treated as a child; but, where the records of the court or the adoption papers have been destroyed or lost, proof of the contents of such records or papers by parol testimony then may be made, and circumstantial evidence, including acts and declarations of the adopting parent relative to such adoption may be admitted. Naworth v. Hawaorth et al., 123 Mo. App. 303, 100 S. W. 531; Moore v. Bryant, 10 Tex. Civ. App. 131, 31 S. W. 223; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

All of the evidence relative to defendant's adoption is practically uncontroverted by plaintiffs.

One witness by the name of Wilson, who was district judge of the Choctaw Nation for Towson county at the time of the admission of the state, testifies that he had resided in Towson county during his entire life; that in 1892, and 1893 his father was county judge of said county; that he had been familiar with the records and affairs of the County Court of that county; that the records of that court, made from 1890 to 1894, were burned; that the county clerk kept said records at his home, as there was no office for them to be kept in at the time;

and that the clerk's residence was burned and the records of the court destroyed, so that they were never brought back to court. He did not remember the exact date of the fire, but that it occurred along about 1894 or 1895. During this time Henry Williams was clerk of the county. Both he and the judge of the County Court at the time of the adoption proceeding have been dead for a number of years. Another witness, who for a number of years was an officer of Towson county, either in the capacity of sheriff, deputy sheriff, or special ranger, testifies also that the records of the County Court during the years 1892 and 1893 were burned up; the exact date of the fire he could not give, but thought it was about the year 1897, which date he fixed by the fact that on the 1st day of October, 1897, he qualified as sheriff of that county. He testifies that, after the burning of the county clerk's residence, the records were never seen by any one. The same witness testifies that he had known both defendant and Isabel O'Bannon practically ever since the birth of defendant. During the greater portion of said time, he has lived near them. He was in court in the early part of 1892 when Isabel O'Bannon handed to him a petition for the adoption of defendant as her child, which witness, upon request of Isabel O'Bannon, handed to the court. Witness did not read the petition then, but did so after it had been spread upon the records of the court. He was present when the court announced its order permitting the adoption, and afterwards read the order of adoption upon the records of the court. He could not remember all the content of the record, but does remember that it provided that: "The adoption of such child to be accepted as the adopted child of Mrs. O'Bannon. The proceeding was complete of the adoption of this child, Betsy Durant, to Mrs. O'Bannon." The same witness testifies that, during her entire life thereafter, Isabel O'Bannon treated defendant as her child, and stated that she had adopted her, and that the child would inherit everything she left at her death. Other witnesses testified that they were present in court when a petition for the adoption was presented, and when an order was made thereon. None of them had read the order as entered on the records of the court and was able to testify as to the contents of the record; but all the evidence tends to corroborate the testimony of the one witness who testified that he read the order, and that it did decree an adoption.

We think the foregoing evidence sufficient to establish the existence of the record of adoption and the contents thereof. It is true that defendant does not show that she has made any search for such record; but the evidence of the foregoing mentioned witnesses, to the

effect that the records were burned, is corroborated by other evidence. One witness who had married about the time this adoption occurred, testified that he had made a search for the records of the office in order to obtain a copy of his marriage license, and had been unable to find the records; that they had been burned. It is true that secondary evidence as to the contents of records or written instruments is not admissible as a general rule, without a showing, on the part of the person offering such evidence, that he has made a diligent effort to locate the written record or instrument, and has been unable to do so because of the fact they are lost or destroyed, but the law does not require a useless thing; and, where the evidence is sufficient that the record or written instrument has been destroyed by fire, there can be no reason or good purpose subserved by requiring the person offering secondary evidence thereof to make search for such destroyed instrument or record.

The judgment of the trial court is accordingly affirmed.

OVERLOCK v. HALL.

81 Me. 348. (1889)

WALTON, J. The exceptions state that the presiding judge against the objection of the plaintiff, allowed the defendant to prove the contents of a letter by secondary evidence, when no notice had been given, before the trial began, to produce the letter. But the exceptions also state that the letter in question was in court, and in the hands of the plaintiff's counsel, and that while the trial was in progress, the defendant's counsel gave him notice to produce it, and that the letter not being produced, the defendant was then allowed to prove its contents by secondary evidence.

We think the ruling was correct. We understand it to be now settled law, both in England and in this country, that notice before the trial begins is not necessary when the writing is in court and in the hands of the adverse party, or his counsel. The old authorities seem to doubt the propriety of such a relaxation of the rule. But Mr. Stephen, in his Digest of the Law of Evidence (art. 68) says that such is now the settled law in England. And the plaintiff's counsel admits that the law is so laid down by Mr. Wharton in his work on evidence.

And we quote the following statement of the law from Fisher's English Digest:

"The principle on which notice to produce a document is required by law, is merely to give a sufficient opportunity to the opposite party to have the document in court to produce if he likes, and so secure the best evidence of its contents, and if he does not, to enable his adversary to give secondary evidence. Therefore, where a party to a suit, or his attorney, has a document with him in court, he may be called to produce it without previous notice, and in the event of his refusing, the opposite party may give secondary evidence." Dwyer v. Collins, 7 Exch. 639. And we find a similar statement of the law in the American Digest, citing Anon. Anth. (N. Y.) 199; Brown v. Isbell, 11 Ala. 1009; Dana v. Boyd, 2 J. J. Marsh (Ky.) 587.

Our rule of court establishes no new principle. It merely affirms a well settled rule of the common law. So held in State v. Mayberry, 48 Me. 218. And it must be accepted and enforced with such limitations and exceptions as experience has shown to be reasonable and proper. Mr. Stephen in his admirable condensation of the law of evidence (art. 68) states these exceptions as follows:

Notice is not required in order to render secondary evidence admissible.

1. When the document to be proved is itself a notice.

2. When the action is founded on the assumption that the document is in the possession or power of the adverse party and requires its production.

3. When it appears or is proved that the adverse party has obtained possession of the original from a person subpoenaed to produce it.

4. When the adverse party or his agent has the original in court.

Exceptions overruled.

JUDKINS v. WOODMAN.

81 Me. 351. (1889)

WALTON, J. The question is whether, if the mortgagor of a farm, while remaining in possession, cuts a reasonable quantity of wood for his own use as fuel, he can on leaving the farm, remove the wood for use elsewhere. His right to cut the wood is not denied. His right to

remove it for use elsewhere is denied. Assuming that the wood was lawfully cut, being reasonable in amount, and in cutting it that no rule of good husbandry was violated, we think that upon leaving the farm the mortgagor would have a right to take the wood with him. When severed from the soil, if rightfully and lawfully severed, the wood would become a mere chattel, and would no more belong to the mortgagee than hay or grain or fruit harvested from the farm. This rule does not apply to wood or timber unlawfully cut; it applies only to wood lawfully cut for fuel for family use. Such in effect was the ruling of the judge who tried the case, and we think the ruling was correct.

Objection was made to the admission in evidence of a paper said to be a schedule of articles claimed by the mortgagees, and on which the wood in question does not appear. It was objected to on the ground of irelevancy. We think it was admissible upon the same ground that any declaration of a party, written or oral, is admissible. Its probative force, if any, was for the jury.

Exceptions overruled.

KNOWLTON v. KNOWLTON.

84 Me. 283. (1892)

PETERS, C. J. In this action the plaintiff declares on a judgment alleged to have been recovered by him against the defendant, in 1867, before Robert Goodenow, Esquire, a trial justice, now deceased. To enable him to introduce secondary evidence of the contents of the alleged record, it became necessary to first prove that the original had been destroyed or lost. Two places would naturally be suggested as necessary to be searched for the missing record. One is the county clerk's office; because the statute requires that all official papers of a trial justice shall be deposited after his death by his executor or administrator in such office. But the record could not be found there. The next inquiry would be of the executor or administrator of the deceased justice. The case does not inform us whether there is or ever was any administrator upon his estate. But the plaintiff was allowed to produce as evidence the following affidavit: "I, Lucy B. Goodenow, of Farmington, Maine, on oath depose and say: That I am a daughter-in-law of the late Robert Goodenow of said Farmington.

That I have in my custody none of the papers of said Robert Goodenow.

"That I have heretofore made diligent search for the records kept by him of his proceedings as trial justice and have been unable to find the same. That if said records were in this State I would be likely to know it. That I have no personal knowledge of their whereabouts, but they are undoubtedly in the hands of some one out of the State. Lucy B. Goodenow."

This affidavit, instead of proving the records lost, proves the contrary, and that "they are in the hands of some one out of the State." There is in this document a very positive intimation that Mrs. Goodenow knows where and in whose hands the papers are. Now the plaintiff is not excused from further search merely because the papers are shown to be out of the State. Due search requires that he produce them or show a reasonable excuse for his failure to do so. Until that be done proof of their contents cannot properly be received. Whar. Ev. sec. 130, and cases in note. Here the deficiency of proof is not supplied, nor is it in any way legally excused.

Judgment for defendant.

WALTON, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

HOISTING MACHINERY CO. v. GOELIER IRON WKS.

84 N. J. L. 504. (1913)

TRENCHARD, J. This suit was brought to recover a commission of five per cent for the services of the plaintiff, a mechanical engineering company, in procuring for the defendant, who was engaged in the business of constructing and erecting iron work, a contract with the Harwood Electrical Company.

Judgment was entered for the plaintiff for the sum of $462.98, being five per cent of $8,432.28, with interest, and the defendant appealed.

It is first urged as a reason for reversal that the judge erred in permitting Charles Goeller, the president of the defendant company, to answer the following question put by the plaintiff's attorney: "Was John Goelier the secretary of the defendant company on August 23rd, 1909?" The only objection stated was that such evidence was not the best evidence. We think there was no merit in the contention. The

incumbency of the office was not in issue, and the fact sought to be proved was collateral in character. Star Grocer Co. v. Bradford, 70 W. V. 496; 39 L. R. A. (N. S.) 184; 10 Cyc. 943.

The judgment will be affirmed.

HIBERNIA SAVINGS AND LOAN SOC. v. BOYD.

155 Cal. 193. (1909)

ANGELLOTTI, J. This is an action on an alleged judgment for deficiency after foreclosure sale of mortgaged premises. A verdict in favor of plaintiff for the amount of such alleged judgment, with interest, was rendered by the jury trying the case, in accord with an instruction of the trial court directing them to so do. This is an appeal by defendant from the judgment entered on such verdict, and from an order denying his motion for a new trial.

Upon the facts, as established by the admissions of the answer and the uncontroverted evidence given at the trial, the trial court was fully warranted in instructing the jury to find for the plaintiff.

What we have said disposes of all the points made by appellant, except the contention that the trial court erred in admitting oral testimony to prove the record in the foreclosure case, including the deficiency judgment. As we have said, all records appertaining thereto had been destroyed in the general conflagration of April 19-20, 1906, and proof of such destruction was made to the trial court. This contention appears to be based on the act of June 16, 1906, providing for the restoration of court records which have been lost, injured, or destroyed by conflagration or other public calamity (Stats. 1906, p. 73), which it is claimed provides an exclusive remedy and forbids all other proof of lost judicial records. It is not claimed in the absence of such act oral proof of the records would not have been admissible. A judicial record is a public writing (Code. Civ. Proc., sec. 1894), and section 1855 of the Code of Civil Procedure provides in terms that when an original writing has been lost or destroyed and proof of such loss or destruction made, it may be shown either by copy or oral evidence of its contents. In Ames v. Hoy, 12 Cal. 11, an action on a judgment, it was in terms held that parol evidence was admissible to show the existence and contents of a judgment, the record of which had been destroyed by fire. The court very tersely disposed of the objection

of the defendant in this regard, saying: "It is also argued that the destruction of the book containing the judgment is the destruction of the judgment itself; so that the primary evidence of the judgment being removed, no other proof of it is admissible. We think that this position is alike indefensible in reason and on authority." (See, also, In re Warfield, 22 Cal. 51, 64, [83 Am. Dec. 49].) Mr. Freeman quotes approvingly the rule announced by Mr. Greenleaf in his work on evidence, as follows: "If the record be lost, and is ancient, its existence and contents may sometimes be presumed; but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence," and declares this rule to be sustained, beyond a doubt, by the weight of authority. (2 Freeman on Judgments, sec. 407 and note.) After a careful examination of its contents, we are satisfied that the act of June 16, 1906, should not be construed as purporting to make any change in this well-settled rule of evidence.

The judgment and order are affirmed.

DAVIS v. MONTGOMERY.

205 Mo. 273. (1907)

WOODSON, J. The plaintiff instituted this suit in the Circuit Court of New Madrid County. The petition states that plaintiff was the owner of certain lands described in the petition, and that defendants claimed some interest therein under and by virtue of a certain tax deed, which plaintiff alleged was void for want of proper service on the defendants, and prayed that the title and interest of all parties in and to said land be ascertained and determined by the court, as provided by section 650, Revised Statutes 1899.

The answer was a general denial and a plea of the thirty-year Statute of Limitations.

The replication was a general denial of the new matter set up in the answer.

There are but two questions presented by the record in this court for consideration. The first is, can the contents of a lost or destroyed record be shown by parol evidence? and, second, were the allegations of the petition and the order of publication sufficient to give the Cir-

cuit Court jurisdiction over the subject matter in the case of Steel, Collector v. The Unknown Heirs of Robert C. Hayes?

The defendants contend that the action of the court in permitting the introduction of parol evidence to show the contents of the order of publication in that case was erroneous. The evidence of the circuit clerk and that of his deputy showed that they made diligent search in their office for the record of that order and that it could not be found; and the evidence of Mr. Wright, the editor of the Weekly Record, showed that the order of publication was delivered to him for publication, and that it was duly published in his paper, and that it was an exact copy of the order admitted in evidence, and that the certified copy delivered to him for publication had been destroyed by fire in the year of 1899.

The record clearly shows that said order of publication had been made and published, and had either been lost or destroyed prior to the date of the trial of this suit.

The rule of law in this State is well settled, that the contents of a lost or destroyed record may be established by parol evidence in the same manner as the contents of other lost or destroyed documents are shown. (Parry v. Walser, 57 Mo. 169; Foulk v. Colburn, 48 Mo. 225; Land & Mining Co. v. Land & Cattle Co., 187 Mo. 420.)

The recital in the judgment rendered in that case to the effect that the defendants had been duly notified by publication of the institution and the nature of that suit did not prevent plaintiff in this suit from showing by parol evidence that the order of publication did not comply with the provisions of section 580, Revised Statutes 1899, because, as stated by Valliant, J., in speaking for this court, in a well and very carefully considered case: "Appellant contends that the recital in the tax judgment to the effect that the summons was served cannot be overcome by the evidence of those witnesses. If the files in the case were accessible, the return itself would be the best evidence, and by it the recital in the judgment would be contradicted, but when the files in the case are lost their contents can be proven by the next best evidence." (Land & Mining Co. v. Land & Cattle Co., 187 Mo. 1 c. 433.)

In the case at bar, the record of the order of publication and the certified copy which was delivered to the publisher were both lost or destroyed. Under those circumstances it was proper for the court to admit in evidence the files of the paper containing the publication of the lost or destroyed order. The editor swore the files contained a true and correct copy of the order delivered to him by the clerk for publication. This made the files the next best evidence of the publi-

cation of the order. (St. Louis Ins. Co. v. Cohen, 9 Mo. 421; Brown v. Railroad, 69 Mo. App. 584.)

It follows from what has been said, that there was no error in the action of the trial court in admitting parol evidence to prove the contents of the lost or destroyed record of the order of publication, notifying the defendants of the institution of the suit of Steel, Collector, v. the Unknown Heirs of Robert C. Hayes, deceased.

For the reasons herein stated, the judgment of the Circuit Court is hereby affirmed.

All concur.

MORRISON v. WEIK.

19 Cal. App. 139. (1912)

The facts are stated in the opinion of the court.

SHAW, J. Action to have a certain deed, which purported to have been made by plaintiff to defendant Anna Ilmer Weik, canceled and annulled upon the ground that the signature thereto had been forged by defendants. The court upon ample evidence found that the instrument had been duly signed and executed by plaintiff, and accordingly gave judgment for defendants, from which, and an order denying her motion for a new trial, plaintiff appeals.

The sole alleged error upon which appellant bases her claim for reversal is that the court, over plaintiff's objection, permitted the introduction of evidence on behalf of defendants tending to show that plaintiff signed and executed the deed which defendants were, by reason of the loss thereof, unable to produce in court. Plaintiff testified that she did not sign the deed, and now on appeal contends that defendants should not have been permitted to prove the contrary, since they did not produce the deed, nor offer sufficient proof of its loss. The question at issue, however, was not the contents of the instrument, which, it was conceded by the complaint, purported to be a conveyance of the property described therein, but whether the name of plaintiff attached thereto was in fact her genuine signature. While the production of the alleged forged signature would have afforded opportunity for its inspection and comparison with admitted genuine signatures of plaintiff, thus aiding in the determination of the question at issue, the want of such production constituted no ground for the exclusion of evidence

touching the fact in controversy, upon the ground that it was secondary in character, and hence not admissible until the loss of the deed was shown. Moreover, conceding that the testimony offered, and to the introduction of which plaintiff objected, was competent only upon proof of the loss of the instrument, we think the evidence clearly and sufficiently established such fact. The evidence shows that subsequent to the bringing of the suit accusing defendants of the forgery, one of them, Fred G. Weik, had the deed in his possession, and, accompanied by his attorney, went to the office of plaintiff's attorney to whom he exhibited the deed and tendered it to him for inspection. Upon the latter refusing to accept it or look at it, the same was returned to the office of his attorney. Thereafter defendant obtained it to show to some of his friends and again returned it to the office of his attorney. It appears that both said defendant and his attorney made diligent search and effort, but without success, to find the deed. The fact that the deed was tendered to plaintiff's attorney for inspection negatives any suspicion that might otherwise arise from withholding it. Without entering upon a full discussion of the evidence, suffice it to say that it was sufficient to satisfy the mind of the court that the instrument was unintentionally mislaid or lost, and that after a diligent search made there for it could not be found. Such preliminary proof is left to the discretion of the trial judge, and unless manifestly insufficient to warrant the introduction of secondary evidence, his ruling will not be disturbed on appeal. (Kenniff v. Cauleld, 140 Cal. 35; 73 Pac. 803.)

Judgment and order appealed from are affirmed.

ALLEN, P. J., and JAMES, J., concurred.

MORRISON v. PRICE, &c.

130 Ky. 139. (1908)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

Mrs. Joyce Morrison brought this suit against Henry Price and Oliver Blair to recover damages for their forcibly seizing her and putting her and her property out of a house which she occupied as the tenant of Price. The defendants filed answer, in which they traversed the allegations of the petition.

The court at the conclusion of the evidence instructed the jury per-

emptorily to find for the defendants, which was done; and, the plaintiff's petition having been dismissed she appeals.

The plaintiff offered in evidence a deposition taken by a commissioner in a proceeding to supply the lost record; the papers of the proceeding in which judgment was rendered in her favor being lost. The court properly sustained exceptions to this deposition. When the papers of a case are lost, and a proceeding is instituted to supply the lost record, the proof taken by the commissioner may not be read as a substituted record. In Mayo v. Emery, 103 Ky. 640, 45 S. W. 1048, 20 Ky. Law Rep. 638, the court said: "The statute provides that the evidence which the commissioner takes shall be in writing, and shall be legal evidence, and shall be returned to the clerk of the court and safely kept by him. The statute does not provide that the evidence which the commissioner is required to take shall be used in place of the parts of the record which are lost. The testimony which he takes is simply the evidence upon which the court must act in making a substitution for the lost record. To supply the lost record, it is essential that the court should make an order to that effect, and he sends his commissioner out to get the evidence upon which to act." When the record has been thus supplied by an order of court, the judgment of the court is conclusive that all preliminary steps were properly taken; but, until it is thus supplied, the substituted record cannot be read.

Where the record is lost, and has not been supplied, the contents of the lost record may be shown by parol evidence, just as the contents of any other lost paper may be shown. Bullock v. Commonwealth, 96 Ky. 537, 29 S. W. 341, 16 Ky. Law Rep. 621. It is common practice to prove by parol evidence the contents of a lost deed, where the record has been destroyed; and there is no reason why the contents of a judicial record may not be proved in the same way until it is supplied. The court, therefore, improperly excluded the testimony of Mrs. Morrison and the police judge as to the record being lost and as to its contents.

Judgment reversed and the cause remanded for a new trial.

ATLANTIC COAST LINE RAILROAD CO. v. HILL.

12 Ga. App. 392. (1912)

RUSSELL, J. Hill brought an action in the City Court of Nashville against the Atlantic Coast Line Railroad Company to recover for damage to a lot of household goods and furniture which he alleged he, as consignee, had received from this carrier at destination in a damaged condition. The jury returned a verdict in favor of the plaintiff, and the defendant excepts to the overruling of its demurrers, the refusal to strike a notice to produce certain papers which had been served upon the defendant, and the overruling of its motion for a new trial.

The motion for a new trial assigns error upon the court's permitting the plaintiff, while testifying, to read from a book kept by himself and testify therefrom; because the defendant had produced a copy of the bill of lading showing what goods were shipped, delivered, and received by the defendant, and because oral testimony was not admissible when a correct copy of the documentary testimony was obtainable, and especially when it had not been shown that the original papers called for in the notice were in the possession of the defendant. As to these objections it is only necessary to say that the plaintiff testified that he had delivered the original bill of lading, along with the notice to trace, to an agent of the defendant and the defendant failed to produce it on notice to produce. The plaintiff was therefore permitted to prove by secondary evidence (such as his oral testimony would be) what was actually delivered to the carrier. Crawford v. Hodge, 81 Ga. 728 (8 S. E. 208). If the original bill of lading had been produced, it would have been *prima facie* evidence to the same point, but its statement of the articles received would not be conclusive upon the shipper. As to the shipper the bill of lading is in the nature of a receipt given by the opposite party, and he may show, if he can, that it does not evidence the acceptance of all of the articles he delivered to the carrier. It is not error to allow the plaintiff to refer to his book, as it does not appear that he testified from his book, and not from his memory. A witness may use any memorandum, useful for that purpose, to refresh his recollection, and his testimony will not be objectionable, if it is, at last, not entirely dependent upon the memorandum, but based upon his memory, even though the memorandum may be necessary in order to refresh his recollection.

There was no error in permitting the oral testimony complained of in the 4th ground of the amendment to the motion for new trial, over

the defendant's objection that "the way-bill or dray ticket" was higher and better evidence. The defendant had failed to produce this way-bill or dray ticket, if he had it in his possession, or to show that it was lost or destroyed, and the court's ruling was therefore in accord with what has just been held. Crawford v. Hodge, *supra*.

Judgment affirmed.

BRENTNER v. THE C. M. & ST. P. R. CO.

58 Iowa 625. (1882)

Action to recover double damages for certain cattle alleged to have been killed by one of the defendant's trains where it had a right to fence. There was a trial to a jury, and a verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, J. A question was raised as to the proof of service of the notice and affidavit of loss required by statute to entitle the plaintiff to double damages. The service, if made, was made by one Summer, who made an affidavit to the effect that he served a notice and affidavit of loss upon the defendant' station agent by reading them to him and leaving the same with him; duplicate originals of which were annexed to his affidavit. The papers introduced in evidence were the so called duplicate originals to which the affidavit of service was annexed. The defendant objected upon the ground that the papers were inadmissible without first having called upon the defendant to produce the notice and affidavit read to, and left with the defendant's station agent. The defendant relies upon McNaught v. C. & N. W. R'y Co., 30 Iowa 336; Cole v. C. & N. W. R'y Co., 38 id. 311; Campbell v. C. R. I. & P. R. R. Co., 35 id. 334.

The doctrine of those cases is that the service cannot be made by leaving a copy of the affidavit of loss, but must be made by leaving the original. What was served in this case was without question the original, if what the plaintiff claims was served was in fact served. The question presented is, as to whether the original papers left with the defendant's agent are to be deemed the best evidence and all other evidence secondary. If so the plaintiff was not entitled to introduce the evidence which he did, without first showing that he had notified the defendant to produce the papers left with its agent.

The doctrine is familiar that where a person seeks to give evidence

of the contents of an instrument he must produce the original or account in some way for its non-production. But the papers in question were not, we think, instruments in such sense as would justify us in applying the rule above mentioned. It has been repeatedly held that proof of the service of a notice can be made without notice to the other party to produce the notice served. Atwell v. Grant, 11 Md. 101; Central Bank v. Allen, 16 Me. 41; Eagle Bank v. Chapin, 3 Pick. 180; Falkner v. Beers, 2 Doug. (Mich.) 117; Leavitt v. Lines, 3 N. H. 14; Morrow v. Commonwealth, 48 Penn. St. 305. See also 1 Greenleaf on Ev., sec. 561. Now while one of the papers in this case was an affidavit, it falls, we think under the same principle. It was a mere amplification of the notice by a sworn statement of the truth of the matters of which the defendant was notified. The papers introduced were said to be duplicate originals. If so they must have been equivalent to an exact copy which is the essential idea; and as such they were admissible as a means of describing the papers served

Reversed on other grounds.

TRAINOR v. LEE, CITY TREASURER.

34 R. I. 345. (1912)

PARKHURST, J. This is an action on the case to recover the sum of four hundred and forty-three dollars and twenty-one cents ($443.21), for services rendered by the plaintiff as Chief of Police, Town Sergeant, and Dog Officer of the town of Cranston in the city of Cranston.

The next exception relates to the testimony offered by the defendant's counsel, that there was no appropriation made by any proper authority, from which payment of the plaintiff's claim could properly be made. Defendant's counsel offered himself as a witness as to the facts, without attempting to produce, or to account for the lack of, record evidence on this point, where it was quite evident that such record evidence could and should have been produced, if it existed. It is quite manifest that it would have been error to allow him to offer his oral evidence of such matters. 3 Elliot Ev. 1942; Owings v. Speed, 5 Wheat. 420; Hutchinson v. Pratt, 11 Vt. 402; Gilbert v. New Haven, 40 Conn. 102; Morrison v. Lawrance, 98 Mass. 219, 221. This exception is overruled.

We find no error; the exceptions alleged by the defendants are all

overruled, and the case is remitted to the Superior Court with direction to enter judgment upon the verdict for the plaintiff.

COMMONWEALTH v. MORRELL.

99 Mass. 542. (1868).

Indictment for robbery. At the trial in the Superior Court before Devens, J., the defendants were found guilty, and alleged exceptions which were allowed as follows:

"The evidence for the commonwealth tended to show that Thomas Wait of Greenfield was robbed on the night of February 19, 1867, at Greenfield. There was further evidence tending to show that Anthony Baker, one of the defendants, the day after the robbery shipped by express from South Deerfield two valises for Chicago, Illinois. The express agent at South Deerfield testified that he affixed tags to the valises, which he marked by direction of Baker, 'B. Anthony, Chicago, Ill.,' which name Baker gave as his own. Afterwards James P. Wade, a detective officer, testified that he and one Jones, his partner, arrested the defendants at Chicago, took possession of their baggage, and detached the tags from their valises for the purpose of preserving them as evidence. The witness was proceeding to state what was written on the tags so detached by them when the defendants' counsel objected, claiming that the tags must be produced or shown to be lost before the writing thereon could be given by the witness. The witness then testified that he had kept the tags, taken them to Boston, and given them to Jones, and that they had been placed by Jones in a drawer in the office jointly occupied by Jones and the witness, to which drawer they both had access and keys, and of which both had equal control; that they could not find them, and he believed them to be lost. Jones was not called as a witness. On this testimony, and against the defendants' objection, the presiding judge ruled that the witness might state what was written on the tags; and the witness stated that on the tags was written 'B. Anthony, Chicago, Ill.'"

CHAPMAN, C. J. The law generally requires the production of the highest evidence of which a thing is capable; and evidence is to be excluded which supposes still higher evidence behind in the possession or power of the party. But the rule is far from being universal. For example, it does not require that a supposed writer shall be called to

prove his own handwriting, or that a person whose identity is to be proved shall be produced in court. The same is true in respect to an animal or any other object the identity of which is to be proved.

The general rule is most frequently applied to writings, where proof is offered of their contents. The writing itself must be produced. But there are many exceptions as to writings. An inscription on a banner or flag carried about by the leaders of a riot may be proved orally. The King v. Hunt, 3 B. & Ald. 566. Or a direction contained on a parcel. Burrell v. North, 2 Car. & Kirw. 679. Or a notice to an indorser of a promissory note. Eagle Bank v. Chapin, 3 Pick. 180.

In the present case, the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag with the written direction upon it might have been more satisfactory to the jury than oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters.

But even if it ought to have been produced in the absence of evidence of its loss, the proof of loss was adduced to the judge, and his decision as to the credibility of the evidence of loss was conclusive, and not subject to exception. Foster v. Mackay, 7 Met. 531.

Exceptions overruled.

THE PAROL EVIDENCE RULE.[1]

AUGUSTUS ALLEN & another v. RICHARD FURBISH.

70 Mass. 504. (1853)

Action of contract on a promissory note for $30, dated August 13th, 1853, signed by the defendant, payable to the plaintiffs or order in three months from date, with interest.

At the trial in the Court of Common Pleas, the defendant was allowed against the plaintiffs' objection, to introduce parol evidence "that on the 13th of August, 1853, the defendant purchased a horse of the plaintiff for $60, and paid for $30 in cash, and gave this note for the balance; that it was agreed at the time of purchase, as an inducement to the bargain, that if the defendant should be dissatisfied with the horse within three months, he might return him to the plaintiff, rescind the contract, and receive the note and money; that the horse was bought upon that condition; and that within a week after the purchase the defendant was dissatisfied, took the horse back and offered him to the plaintiffs and demanded the money and note, but the plaintiffs refused to receive him."

Hoar, J., ruled "that if the jury were satisfied that the note was given as a part of the price of a horse sold to the defendant by the plaintiffs; and that the horse was sold to the defendant upon the condition that if he should be dissatisfied with the horse within three months and should return him, the bargain should be rescinded and the money and note returned; and that the defendant within three months was dissatisfied, and did return the horse, and demand the money and note; then the consideration of the note had failed. and the plaintiffs could not recover, although they refused to receive the horse. But that, if not satisfied of these facts, they should find for the plaintiffs."

The jury returned a verdict for the defendant, and to these instructions, and to the admission of the parol evidence, the plaintiffs excepted.

DEWEY, J. The principle, that parol evidence is inadmissible to annex a condition to an absolute promise in writing in the form of a promissory note promising to pay a certain sum of money on a certain day named, seems to be too well settled in this commonwealth to be further questioned.

In the present case the parol evidence is not offered to show any illegality in the contract, or any fraudulent representation or breach of

[1] Hughes on Evidence, p. 235.

warranty as to the nature of the property sold, but simply to show that the note was given upon a condition rendering it defeasible. It has no tendency to show a want of consideration, or a failure of consideration, as we understand the law on this subject. There was a good and valid consideration for the note in any view of the case. The transfer of the possession of the plaintiff's property to the defendant, to be held and enjoyed as his own, and with the full right to sell and dispose of it for his own benefit, was in itself a sufficient consideration for his note. This consideration has never failed, but has continued to be enjoyed by the defendant. The gravamen complained of by the defendant does not reach the consideration, or show any failure therein. The parol evidence would, if competent, prove that the plaintiff had not performed a stipulation on his part to deliver up the note on the happening of a certain event.

Had the plaintiff received back the horse, and treated the contract of sale as rescinded, the defendant might properly have insisted upon such fact in defense of the right of the plaintiff to recover on the note. That would have presented a different case, and might have been competent to show the defendant was thereby discharged from further liability on the note, for the reason that plaintiff had assented to the rescinding of the contract, and taken back the property.

In the view we have taken of this case, a majority of the court are of opinion that the parol evidence was inadmissible for the purpose of sustaining the defense. It was not admissible as evidence showing a want or failure of the consideration of the note, its effect being solely to engraft a condition upon an absolute written promise, and by force and effect of this condition to defeat the recovery of the note.

Exceptions sustained.

RANDALL B. SWEET v. GRANVILLE S. STEVENS.

7 R. I. 375. (1862)

Assumpsit upon a check drawn by the defendant on the 25th day of June, 1862, upon the High Street Bank, in Providence, requesting said bank to pay to the plaintiff, or order, on the 12th day of July, 1862, the sum of forty-five dollars, which check the bank refused to pay, of which the defendant, on the same day, had notice, &c.

BULLOCK, J. The only question in this case is, whether the parol

testimony, offered by the defendant in bar of the plaintiff's action, is admissible under the rules of evidence.

No oral declarations or agreements, made between the parties to a written contract, are admissible, to contradict or vary the terms of such contract. The law presumes the written engagement to be the contract of the parties, and to embrace all the terms and stipulations deemed material by either at the time of its execution. And hence the whole current of authorities is, that in an action upon a note, check, or bill of exchange, for the payment of money absolutely, and which has been fully executed and delivered by the original parties thereto, it is not competent to show by parol, that such note, check, or bill of exchange was not to be paid except upon a contingency which has not happened, or upon a condition which has not been performed.

The mode of preserving the condition or defeasance is, to incorporate it into the written contract, or to cause the writing to be executed and delivered in escrow. Free v. Hawkins and Foster v. Jolly, before cited. If, therefore, the check sued upon has taken effect by an actual, absolute, and legal delivery to the plaintiff, so that the defendant had no right to recall it, and being in terms payable without condition, oral testimony is offered to show that it was to be paid upon conditions, such evidence varies the terms of the written instrument, and is clearly inadmissible.

It is, however, competent to show by parol the circumstances under which the written contract was made, as that it was in pursuance of some general purpose, and what that purpose was. 3 Starkie on Evd. 1047, 1048. And so in Hubbard v. Barker, executrix, 1 Allen, 99, which was a suit by a grandchild against her grandmother's executrix, to recover a note given to the child by the testatrix, the plaintiff was permitted to show, by parol, the manner or plan by which the testatrix distributed her estate, and that the note was given in pursuance of, and as a part of, such plan.

The question here is not a question touching the consideration of a check, a want or failure of which, between the original parties, may be shown; neither is it, upon the facts stated, a question, whether parol evidence may be offered to vary or change an absolute written promise into a conditional one; but, rather, whether it is competent to show, by parol, that such written promise grew out of an oral agreement or negotiation, which agreement was inchoate and unexecuted in fact by either party, and by the express terms of which the written instrument was not to be regarded as obligatory, but its operation and efficacy suspended until the happening of an event then in the future. In such case,

the rule which presumes the written instrument to embody the entire contract and all its stipulations, does not apply. The oral evidence is offered, not to contradict or vary the written, but admitting, seeks to avoid it by showing that, as an entire and independent agreement, it has no present legal effect.

The evidence, objected to, was offered to show that the plaintiff and defendant contemplated a trade, by the terms of which the defendant was to give $45 for the Mathewson note and his own debt of $13, if he could use the Mathewson note in set-off. If he could not use the note, he did not propose to buy it. He received the note into his possession for the purpose of ascertaining this fact. It was endorsed by the plaintiff to enable the defendant to use it, if Mathewson would receive it. If Mathewson would not receive it, the defendant was to return it. The defendant acquired no present title under the endorsement, because there was no complete and absolute delivery of the note made, or intended to be made. Upon thus receiving the note, the defendant gives his check to the plaintiff with the express understanding that the plaintiff was to return it if the defendant could not use the note. Hence the check was post-dated. It was in the nature of a memorandum-check. It vested no present authority in the plaintiff to demand or receive the money; neither was it intended to. And this view of the transaction is confirmed by the fact that the plaintiff did not receipt his bill against the defendant, thus showing that he did not regard the trade as completed.

We think the evidence does not fall within the rule of parol testimony offered to vary or contradict a valid written agreement, and upon the facts stated in the bill of exceptions, was admissible.

As the defendant has impounded, in court, the Mathewson note for the plaintiff's use, the plaintiff's exceptions are overruled, and judgbent will be entered in the Court of Common Pleas upon the verdict.

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[1] Hughes on Evidence, p. 235.

JOHNSON v. ELMEN.

94 Tex. 168. (1900)

GAINES, C. J. This case comes to us upon a certificate of dissent from the Court of Civil Appeals for the First District.

The trial court admitted evidence of the parol agreement to pay the vendor's lien upon the land conveyed by Elmen to Johnson, and upon appeal the Court of Civil Appeals upheld that ruling, one of the judges dissenting. This presents the question which has been certified for our determination.

The cases in which the question of the admissibility of parol evidence to affect a covenant against incumbrances in a deed conveying land may be divided into three classes.

In many cases it has been sought to show that one or more incumbrances were known to the covenantee and to exclude such from the operation of the covenant. But it is held, certainly by the great weight of authority, that this can not be done. A sufficient reason for the rule is that the covenantee in many instances may insist upon the covenant for the very purpose of guarding against incumbrances which he knew to exist. In other cases, it has been held that parol evidence can not be admitted to show merely that the parties orally agreed that a certain incumbrance should be excepted from the operation of the covenant. To admit such evidence is to violate the familiar rule that parol evidence is not admissible to vary the terms of a written contract. So far, the courts are in practical accord. But whether or not, notwithstanding a covenant against incumbrances in a deed, it may be shown by parol evidence that it was agreed between the parties at the time of the conveyance and as a part of the contract, that the covenantee should himself discharge an incumbrance, is a question of more difficulty and one upon which there is a conflict of authority. We think, however, the rule that in such cases parol evidence is admissible is supported by the better reason and the weight of authority.

A deed may contain all the terms of the contract of sale between the parties to it. This occurs where the purchase money is fully paid at the time of the execution of the instrument and its payment is acknowledged in the deed. Again, the recitals may be so explicit as not only to show all the stipulations on part of the grantee but also to exclude the existence of any other. In other words, the conveyance, with its recitals, may be such as to make it apparent upon its face that it contains all the terms of the contract between the parties. But for the

reason that the conveyance must be in writing in order to pass the title, it sometimes occurs that the deed is but a part of the contract, and that there are other stipulations on the part of one or both of the parties which do not appear upon its face. When such other terms of the contract are not required by law to be in writing, they may be proved by parol evidence and given their proper legal effect—subject, however, to the rule that the effect of the deed as a conveyance and as to its covenants can not be varied by such proof. Parol evidence can not be admitted to show that more or less land was agreed to be conveyed than appears in the deed itself, nor, where there is a covenant against such incumbrances, that a particular incumbrance was to be excepted which is not excepted in the writing. Thus as a rule, a consideration different from that recited in the conveyance may be shown by parol evidence. It is clear, therefore, that, in the absence of a covenant against incumbrances in the deed in question, the appellee would have been permitted, in any proceeding in which the question could have arisen, to prove by such evidence that, as a part of the consideration for the conveyance of the land, the appellant agreed to pay the notes which were a charge upon it. But there being a covenant against incumbrances in this case, the result of such proof is the same as if the notes which were secured by a vendor's lien upon the land had been expressly excepted from the covenant. The question presents itself, whether, because of the resulting effect upon the covenants in the deed, the grantor is deprived of the right of showing the assumption of the notes on the part of the grantee—a right which would clearly have been his had he not covenanted against incumbrances. While there is very high authority to the contrary, we are of opinion that it does not (he is not). The agreement of the grantee to pay the notes was a part of the contract for the exchange of the lands, but was not a necessary part of either conveyance. It was an additional consideration which the appellant was to pay for the premises conveyed to him, which, as a general rule, as we have seen, may be established by parol evidence. It was a part of the original contract which was agreed upon between the parties, and which was finally consummated by their respective conveyances. The ground upon which the authorities which hold parol evidence inadmissible in such a case proceed, is that the effect of the proof is to except the incumbrance from the covenant and thus to vary the contract as shown by the writing. But does proof of the promise to discharge the debt which is a lien upon the land except anything from the covenant? Does it conflict with or is it inconsistent with the terms of the conveyance? We think not. Clearly, in a suit

for a breach of a covenant against incumbrances, it could be shown that a lien had been discharged either before or at the time of or after the execution of the deed; and we think that the effect of the promise which was proved by parol in this case was not to except the vendor's lien notes from the covenant, but was to show that as between the parties to the contract the incumbrance had been discharged. Is the appellant to be permitted to claim a right by reason of the nonpayment of a debt, which, by his own promise, he became primarily liable to pay? Does it lie in his mouth to complain that his grantor has not done that which he bound himself to do? The lien remained after his promise, but as between him and the grantor, it was no longer an incumbrance resting upon the latter, but one which he had taken upon himself. It seems to us that although this is a question of law, the equitable principle should apply, that that is considered as done which ought to be done, and that as between the parties the lien should be held to be discharged.

For the reasons given, we are of opinion that the majority of the Court of Civil Appeals was correct in holding that parol evidence was admissible to show that at the time of the execution of the deed in question it was agreed between the parties that the grantees assumed the payment of the notes which were a charge upon the premises, and our opinion will be so certified.

WEBSTER & HUBBARD v. PAUL.

10 Ohio 531. (1860)

James R. Paul sued Daniel A. Webster and Jasper M. Hubbard, as partners, under the firm name of Webster & Hubbard, on an account connected with a transaction in hogs between the parties.

Webster put in his own answer, and in it claimed, in substance, that there was no partnership between him and Hubbard in the transaction; that there was a written contract between him and Paul for the sale and delivery of the hogs, and that the contract had been violated by Paul, and that there was a large sum due him (Webster), for which he asked for a judgment against Paul.

Hubbard, in his answer, denied that he was indebted to Paul in any sum, and denied that he was a partner, or had any interest in the hogs at the time the contract was made by Webster and Paul.

On the trial, at the June term, 1857, of the District Court, certain evidence was offered by the defendants and excluded by the court, and a verdict returned for the plaintiff.

Thereupon the defendants moved for a new trial, on the ground that the court erred in overruling the testimony offered by them. The court overruled the motion, and entered judgment on the verdict. The error now relied on is, that the court erred in not granting a new trial.

GHOLSON, J. The contract in writing shows that Paul had made an advance on hogs, which he was to ship through to New York, and do the best he could with them in the market. We infer from the statements in the record that there were two routes for the shipment which the parties intended should be made—one by rail and steamboat, and the other overland, by railroad only. The object of the evidence offered, as shown by the first bill of exceptions, was to restrict Paul in shipping the hogs to the former of the two routes.

It is claimed for the plaintiffs in error, that there was a latent ambiguity; that there were two routes to New York well known to the parties; that the writing did not specify one or the other, and therefore it might be shown which the parties intended. But, we think there is a misapprehension as to the meaning of a latent ambiguity. "A latent ambiguity is where you show that words apply equally to two different things or subject-matters." Smith v. Jeffryes, 15 M. & W. 561. The things must be different, and the parties must, on account of such difference, have intended one and not the other. It is not a case of latent ambiguity, where, according to the language of the contract, the parties may have intended either of the two things in which the difference is claimed to exist. Thus in the case just cited, where the contract was to deliver "ware potatoes," and evidence was offered to show that there were two kinds of "ware potatoes," known in the market as "regents wares" and "kidney wares," and that the former were intended, it was held, that there was not a latent ambiguity, and that the evidence "went to vary and limit the written contract between the parties."

Upon a like principle and distinction, stands the case of a written contract to do a particular thing where there are two usual and ordinary modes in which it may be done. The party upon whom performance devolves, may adopt either. If, in this case, it might be an advantage to Paul to select one or the other of the two routes, as for example on account of its being more rapid, and thereby securing him an earlier return of the money he had advanced, he had the right so to do, according to the terms of the written contract. That he might

properly have done so under that contract, is admitted by the offer to prove a verbal contract which would restrict the right. To allow this would, we think, in the language before used, vary and limit the written contract between the parties.

Our attention has been directed to the case of Barrett v. Allen, 10 Ohio Rep. 426. In that case, evidence was received to explain the meaning of the expression, "fair wholesale factory prices." The words had no definite, precise meaning, and therefore required explanation. This might have been given by showing a general usage and practice in the particular trade or business. Lewis v. Marshall, 7 M. & G. 729-744; Syers v. Jonas, 2 Exch. 111-116; Brown v. Byrne, 3 Ell. & Black, 703-715. So it is permissible "to show in what sense words are used, by showing what the situation of the parties was at the time." Bainbridge v. Wade, 16 Q. B. 89-98. Evidence of the circumstances and relation in which the parties stood, may be let in to explain the meaning of language, whenever it tends to throw light upon that meaning. Id. 71 Eng. Com. L. 101, note, and cases cited. "Parol evidence was clearly admissible to show the circumstances under which the contract was made, and the relation of the plaintiff and defendant to it, and to each other, in respect to it." Humphrey v. Dale, 7 Ell. & Black, 266-272. According to these rules, the evidence in the case of Barrett v. Allen was properly received. Something was said, by the judge delivering the opinion, as to there being a latent ambiguity. We think the case more properly came within the rules which have been stated. But in no view, according to the proper meaning of a latent ambiguity as before explained, would that case reach such a case as the present. The parties in that case could not have intended either of the two prices proved, but must have intended to provide for one price only.

We think there was no error in this case, and the judgment must be affirmed.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF and PECK, JJ., concurred.

HARRISON v. MORRISON.

39 Minn. 319. (1888)

MITCHELL, J. The proposed defense is that when the promissory notes in suit were executed, there was an oral agreement, annexed as a condition to their payment, that if the defendant should be forced to make an assignment for the benefit of his creditors, under chapter 140, Laws 1881 (which he was), the plaintiffs should file their claims on the notes with the assignee, as provided by the statute, and execute and file with the clerk of the court a full release to the defendant of all claims, other than such as might be paid by the assignee under the provisions of the statute. This is clearly inadmissible, under the familiar rule that the terms of a written contract cannot be contradicted, altered, added to, or varied by oral evidence. By their terms the defendant promises to pay absolutely the full amount of the notes at the dates therein named, the proposed parol evidence had no tendency to prove either a want or failure of consideration, but merely to show that a condition was annexed to the manner of payment, and amount to be paid, different from that expressed in the notes. The notes on their face purport to be a complete expression of the whole agreement of the parties, and it must be conclusively presumed that they have introduced into them every material term of the contract. It is not a case where the agreement was oral, and the writings executed in performance of part of the agreement, leaving another and separate part of it still wholly in parol, as in Healy v. Young, 21 Minn. 389. Neither is it a case of a separate collateral agreement upon a matter distinct from that to which the writings relate, and upon which they are silent. On the contrary, the oral agreement relates to the very matter covered by the writings, and is inconsistent with their express terms. Thompson v. Libby, 34 Minn. 374 (26 N. W. Rep. 1); Underwood v. Simonds, 12 Met. 275; Allen v. Furbish, 4 Gray 504 (64 Am. Dec. 87); Eighmie v. Taylor, 98 N. Y. 288. This renders it unnecessary to consider the other questions discussed by counsel. The order sustaining the demurrer to the answer must be affirmed.

THE OAK RIDGE COMPANY v. JOHN TOOLE.

82 N. J. 541. (1913)

LEWIS, V. C.

The defendant in this case entered into a written agreement with the complainant to convey a tract of land on East Thirty-third street, in the city of Paterson, New Jersey, fifty feet by one hundred and twenty-five feet, as part consideration for a house and lot conveyed to the defendant. The defendant in making the conveyance presumed that he had legal title to the lots but after entering into the agreement, the parties discovered that he had title only to a tract one hundred feet in depth. When the complainant discovered the defective title, he called upon the defendant to secure the additional twenty-five feet provided for in his deed to the complainant. They had some consultations about the matter and finally met in the office of Sherwood & Lockwood, real estate agents in the city of Paterson, New Jersey; at the time of the meeting they were accompanied by their respective attorneys. After some discussion of the subject of meeting, they entered into an agreement wherein the defendant contracted that if he didn't perfect his title to the premises, 298 and 300 East Thirty-third street, Paterson, New Jersey, the tract in question, within two months from that date, that he would purchase from the Oak Ridge Company said premises at the price of $2,000.

The evidence of the complainant was that the defendant did not perfect his title in the manner aforesaid and that it is entitled to a decree compelling the defendant to repurchase the land for $2,000. The defendant admits the execution of the agreement and insists that the contract in question was signed by the parties for "selling purposes," on the understanding that it would not be considered binding on the defendant. The treasurer of the Oak Ridge Company at the hearing was the only witness for complainant and insisted that no such understanding had been had or arrangement been made. The defendant alleged that he had given complainant the agreement upon the representation of Mr. Hapgood, that there would be no trouble about it, that it would not be used at any time, and that his company simply wanted it for "selling purposes." The defendant was corroborated by the testimony of his attorney, Mr. Lynch, and by a witness, Miss Lockwood; both these witnesses stated that they heard the conversation between Mr. Toole and Mr. Hapgood, treasurer of the Oak Ridge Company, to the effect that the price named in the agreement was placed

there for "selling purposes" and that there was no understanding between the parties that Toole should take back the lots at the sum of $2,000.

This case, it seems to me, establishes the rule, that if the parties to an agreement stipulated at the time that it was made that it was to have no binding effect upon them, then, notwithstanding their execution of the agreement, such a contract is of no force and effect at law or in equity. The rule now so well established in equity, admitting parol evidence to show for what purpose the written agreement was executed, was properly invoked by the defendant. The evidence leaves no doubt in the court's mind that in this issue the agreement between the complainant and the defendant was made for the purpose as stated by the latter and his witnesses. It is inequitable and unjust, therefore, for the complainant to enforce the agreement of April 13th.

HARRY B. HATCH v. WM. HYDE AND WM. S. HYDE.

14 Ver. 25. (1842)

Assumpsit, on a promissory note. The defendant pleaded non assumpsit and a special plea in bar.

The County Court decided that the special plea was insufficient, and the defendants excepted to the decision.

The opinion of the court was delivered by

BENNETT, J. The plea in bar sets up a parol agreement contemporaneous with the giving of the note, and inconsistent with the one expressed in the note. The horse, though lame and diseased, was clearly a sufficient consideration for the note, and no fraud is pretended. The note then, being upon sufficient consideration, and absolute upon the face of it, cannot, by parol evidence, be converted into one payable upon a contingency. Bentley v. Bradley, 8 Vt. R. 243. Isaacs v. Elkins, 11 Vt. R. 679. As the agreement, set up in the plea in bar, if made upon sufficient consideration, cannot control the note, it is impossible that it should furnish good matter to plead in bar. The right of action, established by the note, cannot be destroyed by setting up an opposing agreement which, by the rules of evidence, cannot be proved. The plea then was properly met by a demurrer. If it had been traversed and issue joined, it might have been a question whether the rule of evidence, excluding parol, might not have been waived.

If the facts set up in the plea go to defeat the note, as has been argued, for want of consideration, they would have availed the party under the general issue. Though it is true that some matters which may be given in evidence under the general issue, in assumpsit, may also be pleaded in bar, yet it is not such matter as goes to deny the original cause of action. The consideration is of the very essence and foundation of the promise, and a plea, in effect, denying the consideration amounts to the general issue, and is, for this cause, ill, on special demurrer. Potter v. Stanley, 1 D. Chip. R. 243. Gould's Pl. 334, sec. 56. This is made one ground of demurrer. The plea cannot be sustained.

The judgment of the County Court is affirmed.

MILLER v. SPRING GARDEN INS. CO.

202 Fed. 442. (1913)

In error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by Jacob Miller against the Spring Garden Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

GILBERT, Circuit Judge. Error is assigned to the admission of testimony as to conversations between the plaintiff and the insurance agent who procured the policy concerning the alterations that were being made in the plaintiff's building, and error is assigned to the conclusion of the court that the plaintiff had not violated the provisions of the policy by having carpenters and mechanics engaged in building the premises for a period of more than 15 days after the policy was executed and delivered, without the consent of the the defendant, and in holding that the work done upon the building was ordinary alterations and repairs within the permission contained in the rider to the policy.

The disposition of the case in this court depends upon the question of the admissibility of the oral testimony which was taken to show that the plaintiff fully explained to the insurance agents, and the latter understood, the nature of the alterations which were being made in the building and the time which would be necessarily taken in completing the same. Testimony of that nature was admitted by the court

below as explanatory of an ambiguity in the policy, and we think it was properly so admitted. The defendant, after stipulating in the printed policy that the employment of merchants in building, altering, or repairing the premises for more than 15 days should avoid the contract of insurance, attached to the policy a typewritten slip or rider, "Permission granted to make ordinary alterations and repairs." The fact that this provision was attached by a typewritten slip to the policy shows that it was to express the intention of the parties, and that the printed provision in regard to the employment of mechanics, and attached another special provision which made no limitation of time whatever, the question arose, what was meant by the second, and what were the "ordinary alterations and repairs" in the contemplation of the parties? No rule of evidence was violated by admitting testimony to show what that intention was, and what were the circumstances under which the rider was attached to the policy. In cases of doubt or ambiguity the negotiations between the parties are properly considered in giving construction to their agreement. Fire Insurance Co. v. Wickham, 141 U. S. 564, 576, 12 Sup Ct. 84, 35 L. Ed. 860; Seitz v. Brewers R. M. Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; Lindblom v. Fallett, 145 Fed. 805, 76 C. C. A. 639; Lilienthal v. Cartwright, 173 Fed. 580, 97 C. C. A. 530; Kilby v. Hinchman-Renton Fire Proofing Co., 132 Fed. 957, 66 C. C. A. 67.

It was proper to show, therefore, that by the term "ordinary alterations" was meant the very alterations and changes which were then being made. The word "alterations" is an elastic one, and, if the parties so understood its use, it was proper to show their understanding by oral testimony.

We find no error. The judgment is affirmed.

THOMPSON v. LIBBY.

34 Minn. 374. (1885)

MITCHELL, J. The plaintiff being the owner of a quantity of logs marked "H. C. A.", cut in the winters of 1882 and 1883, and lying in the Mississippi river, or on its banks, above Minneapolis, defendant and the plaintiff, through his agent, D. S. Mooers, having fully agreed on the terms of a sale and purchase of the logs referred to, executed the following written agreement:

"AGREEMENT.

Hastings, Minn., June 1, 1883.

"I have this day sold to R. C. Libby, of Hastings, Minn., all my logs marked 'H. C. A.', cut in the winters of 1882 and 1883, for ten dollars a thousand feet, boom scale at Minneapolis, Minnesota. Payments cash as fast as scale bills are produced.

(Signed) "J. H. THOMPSON,
"Per D. S. MOOERS.
"R. C. LIBBY."

This action having been brought for the purchase-money, the defendant—having pleaded a warranty of the quality of the logs, alleged to have been made at the time of the sale, and a breach of it—offered on the trial oral testimony to prove the warranty, which was admitted, over the objection of plaintiff that it was incompetent to prove a verbal warranty, the contract of sale being in writing. This raises the only point in the case.

No ground was laid for the reformation of the written contract, and any charge of fraud on part of plaintiff or his agent in making the sale was on the trial expressly disclaimed. No rule is more familiar than that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," and yet none has given rise to more misapprehension as to its application. It is a rule founded on the obvious inconvenience and injustice that would result if matters in writing, made with consideration and deliberation, and intended to embody the entire agreement of the parties, were liable to be controlled by what Lord Coke expressively calls "the uncertain testimony of slippery memory." Hence, where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking, was reduced to writing. 1 Greenl. Ev. sec. 275. Of course, the rule presupposes that the parties intended to have the terms of their complete agreement embraced in the writing, and hence it does not apply where the writing is incomplete on its face and does not purport to contain the whole agreement, as in the case of mere bills of parcels, and the like.

But in what manner shall it be ascertained whether the parties intended to express the whole of their agreement in writing? It is sometimes loosely stated that where the whole contract be not reduced to writing, parol evidence may be admitted, to prove the part admitted.

But to allow a party to lay the foundation for such parol evidence by oral testimony that only part of the agreement was reduced to writing, and then prove by parol the part omitted, would be to work in a circle, and to permit the very evil which the rule was designed to prevent. The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement, it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks—2 Phil. Evidence (Cow. & H. N. Notes,) 669; Naumberg v. Young, 44 N. J. Law, 331; Hei v. Heller, 53 Wis. 415—and the law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol any more than what is written. 2 Phil. Ev. (Cow. & H. Notes,) 668; La Jarge v. Rickert, 5 Wend. 187; Creery v. Holly, 14 Wend. 26; Stone v. Harmon, 31 Minn. 512.

The written agreement in the case at bar, as it appears on its face, in connection with the law controlling its construction and operation, purports to be a complete expression of the whole agreement of the parties as to the sale and purchase of these logs, solemnly executed by both parties. There is nothing on its face (and this is a question of law for the court) to indicate that it is a mere informal and incomplete memorandum. Parol evidence of extrinsic facts and circumstances would, if necessary, be admissible, as it always is, to apply the contract to its subject-matter, or in order to a more perfect understanding of its language. But in that case such evidence is used, not to contradict or vary the written instrument, but to aid, uphold, and enforce it as it stands. The language of this contract "imports a legal obligation, without any uncertainty as to its object or the extent of the engagement," and therefore "It must be conclusively presumed that the whole engagement of the parties, and the manner and extent of the undertaking, was reduced to writing." No new term, forming a mere incident to or part of the contract of sale, can be added by parol.

That in case of a sale of personal property a warranty of its quality is an item and term of the contract of sale, and not a separate and independent collateral contract, and therefore cannot be added to the written agreement by oral testimony, has been distinctly held by this

court, in accordance, not only with the great weight of authority, but also, as we believe, with the soundest principles. Jones v. Alley, 17 Minn. 269, (292.)

In opposition to the doctrine of Jones v. Alley, we are referred to a few cases which seem to hold that parol evidence of a warranty is admissible on the ground that a warranty is collateral to the contract of sale, and that the rule does not exclude parol evidence of matters that this is based upon a misapprehension as to the sense in which the term "collateral" is used in the rule invoked. There are a great many matters that, in a general sense, may be considered collateral to the contract; for example, in the case of leases, covenants for repairs, improvements, payment of taxes, etc., are, in a sense, collateral to a demise of the premises. But parol evidence of these would not be admissible to add to the terms of a written contract. So, in a sense, a warranty is collateral to a contract of sale, for the title would pass without a warranty. It is also collateral in the sense that its breach is no ground for a rescission of the contract by the vendor, but that he must resort to his action on the warranty for damages. But, when made, a warranty is a part of the contract of sale. The common sense of men would say, and correctly so, that when, on a sale of personal property, a warranty is given, it is one of the terms of the sale, and not a separate and independent contract. To justify the admission of a parol promise to one of the parties to a written contract, on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates. Dutton v. Gerrish, 9 Cush. 89; Naumberg v. Young, *supra;* 2 Taylor Ev. Sec. 1038. See Lindley v. Lacey, 34 Law J., C. P., 7.

We have carefully examined all the cases cited in the quite exhaustive brief of counsel for defendant, and find but very few that are at all in conflict with the views already expressed, and these few do not commend themselves to our judgment. Our conclusion therefore is that the court erred in admitting parol evidence of a warranty, and therefore the order refusing a new trial must be reversed.

COFFMAN v. MALONE.

98 Neb. 819. (1915)

MORRISSEY, C. J. Amos Snyder, Matt Malone and Samuel J. Coffman owned all of the capital stock in a corporation called the Snyder-Malone-Coffman Company, which was doing a live stock commission business in South Omaha. During the fall of 1912, slight differences as to the conduct of the business arose, and December 12 the following writing was drawn up and signed by the parties:

"South Omaha, Neb., Dec. 12, 1912. We, Amos Snyder and S. J. Coffman, have this day sold our interest in the Snyder-Malone-Coffman Company to Matt Malone. The said Amos Snyder to receive $1,500 for his interest, and said S. J. Coffman is to receive $1,000 for his interest, and said business is to be turned over to Matt Malone on December 31, at 6 o'clock p. m., and all bills to be paid up to that time, that is, owed by the firm of Snyder-Malone-Coffman Company, and, after the bills are all paid, each, Snyder and Coffman, can draw out the balance they have to their credit. Amos Snyder has received on this contract ($200) two hundred dollars, and S. J. Coffman has received ($100) one hundred dollars. This contract made and signed by Amos Snyder, S. J. Coffman and Matt Malone this 12th day of December, 1912.

"AMOS SNYDER,
"S. J. COFFMAN,
"MATT MALONE."

December 31, 1912, Snyder delivered his stock, tendered his resignation as president of the corporation, and received from Malone the balance due. Four or five days thereafter the articles of incorporation were redrafted and Coffman and Malone signed the same. Coffman made no assignment of his stock, and neither made nor tendered his resignation as an officer of the corporation until January 15, 1913, when he made an assignment of his stock and tendered the same, together with his resignation, to Malone, and demanded the amount stipulated in this writing. Malone refused to receive the stock or resignation or to pay over the money, and Coffman brought suit upon the contract.

Malone by answer alleged that the writing was executed for the sole purpose of purchasing the interest of Amos Snyder, but it was drawn in the form set out because they wanted Snyder to believe that Coffman was also retiring from the business; that there was a contempora-

neous oral agreement between him and Coffman that, as between them, it was not to be performed; that there was no delivery of the writing to Coffman; and that the check which was delivered was not to be cashed, but was to be returned again by Coffman to Malone. There is an allegation, also, that after Snyder retired from the business, and after the expiration of the time fixed by this writing for the transfer of Coffman's stock, Coffman participated in the election of himself as secretary of the company, and that he continued to act for and in behalf of the company until January 15, 1913; that under their oral agreement Malone was to transfer certain of Snyder's shares of stock to Coffman, which Malone was ready and willing to do, but Coffman did not have the money to pay therefor, and, upon Malone's refusal to accept Coffman's note in lieu of cash, Coffman attempted to repudiate the oral agreement and to enforce this writing.

A jury was waived and the cause tried to the court. Oral testimony was admitted in support of the allegations of the answer. But at the conclusion of the trial, on motion of the plaintiff, the court struck from the record the testimony which had been received in proof of the oral agreement, and entered judgment for plaintiff for the amount due under the writing. There are three assignments of error; but, as the one directed against the ruling of the court in striking this evidence goes to the merits of the whole controversy, it is the only one we will consider. If the ruling in that regard is correct, the judgment is warranted by the pleadings and the proof. No doubt the court relied upon the general rule laid down in Mattison v. Chicago, R. I. & P. R. Co., 42 Neb. 545, and quoted as authority in Nebraska Land & Feeding Co. v. Trauerman, 70 Neb. 795, wherein it is held: "Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract and the result of which would be to change the effect of the written contract in a material portion and to insert or read into it a condition or reservation not contained in it, or implied by its terms"—while the appellant contends that the rule invoked does not apply, and that a party who had been induced to sign a written contract for a certain purpose is entitled to offer oral testimony, for the purpose of showing that it was never intended to be a contract or to be of binding force between the parties. It is not contended that the contract is ambiguous or incomplete, but that plaintiff and defendant were working together for a common purpose; that, in furtherance of this common purpose, it was executed in its present form; that they were not dealing one with the other, but were jointly dealing with Snyder; that,

in the very nature of things, the writing could not contain the agreement between Coffman and Malone, because that would defeat its purpose. If there was no intention on the part of either party to observe the terms of this writing, as between them, this writing was not the contract.

This evidence was not offered with the view of contradicting, varying, or explaining the language employed in the written instrument but to establish a fact or circumstance collateral to the original writing which would control its effect or operation as a binding engagement. On either theory the writing is precisely what both parties intended it to be. If there was an express agreement between Coffman and Malone that it was not to be carried out, Malone in signing was acting, not alone for himself, but also for the plaintiff, and in that event it never became a binding obligation. "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." Norman v. Waite, 30 Neb. 302.

In Barnett v. Pratt, 37 Neb. 349, in discussing a somewhat similar question, the court said: "It is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument."

The doctrine laid down in Norman v. Waite, *supra*, has been reiterated in Davis v. Sterns, 85 Neb. 121, First Nat. Bank v. Burney, 91 Neb. 835, and is the settled rule in this state.

This evidence having been erroneously stricken from the record it follows that the judgment of the District Court must be reversed and the cause remanded.

Reversed.

HARDAGE v. DURRETT.

110 Ark. 63. (1913)

HART, J. This is an action of contract on a covenant of warranty against encumbrances in a deed from appellee to appellants. The court, sitting as a jury, found in favor of appellee, and from the judgment in his favor appellants have duly prosecuted an appeal to this court.

At the time of the execution of the deed, taxes to the amount of $99.10 had been duly assessed, levied and charged against the land conveyed by the deed. It is admitted that the unpaid taxes upon the land were an encumbrance within the covenants of the deed, and such is the effect of the decisions of this court. William Farrel Lby. Co. v. DeShon, 65 Ark. 103; Sanders v. Brown, 65 Ark. 498.

Appellee was allowed to prove, over the objection of appellants, by parol evidence, that at the time the deed was executed, and as a part of the consideration, appellants promised to pay said taxes; and the action of the court in admitting this oral testimony is assigned by appellants as error for which the judgment should be reversed.

On the precise issue raised by the appeal, the authorities are at variance. The courts of Maine and Indiana hold that a parol agreement by the vendee to pay taxes which are a lien upon the land, as a part of the consideration of the conveyance, is a good defense to an action on the covenants of the deed. Fitzer v. Fitzer, 29 Ind. 468; Dearbon v. Morse, 59 Me. 210. So, also, in the case of Johnson v. Elmen, 94 Tex. 168, the court held:

"A grantor by deed of general warranty (implying a covenant against encumbrances) when sued thereon by the warranty who had been dispossessed by a purchaser at a sale under foreclosure of an encumbrance covered by such warranty, can show in defense a parol agreement, as part of the consideration, that the vendee should himself assume and pay off such encumbrance."

The Supreme Courts of Massachusetts and Ohio have held that in an action for breach of a covenant of warranty against encumbrances in a deed which consist of unpaid taxes, it is incompetent for the defendant to prove by parol testimony that at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay the assessment. Simanovich v. Wood, 13 N. E. (Mass.)

391; Flynn v. Bourneuf, 143 Mass. 277, 9 N. E. 650; Long v. Moler, 5 Ohio St. 271.

The Supreme Court of Indiana admits that the doctrine laid down by it has been questioned elsewhere and that the very opposite is held in many of the States. Some of the courts have criticized the Indiana decision, not only as being opposed to the well-known rule that parol evidence is not admissible to vary the contract as shown by the writing, but as being productive of litigation, as is evidenced by the number of decisions on this question in that State.

In the case of Simanovich v. Wood, *supra*, the court said: "While for some purposes it is competent to show what the real consideration of a deed is, a party can not, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant. This would violate the well-settled rule of law which will not permit a written contract to be varied or controlled by such parol testimony."

To the same effect is Devlin on Deeds (1 ed.), vol. 2, 914; Rawle on Covenants of Title (5 ed.), 88.

We think the effect of our previous decisions bearing on this question is to exclude parol evidence to show that it was the agreement of the parties that the covenant was not to extend to a particular encumbrance not expressly excepted from its operation. In the case of Barnett v. Hughey, 54 Ark. 195, the court, in discussing the measure of damages in an action for breach of covenant said:

"In such actions, parol evidence is admissible on the part of the plaintiff to show that the actual consideration was greater than that expressed in the deed for the purpose of increasing the damages, and on the part of the defendant to show that it was such for the purpose of diminishing them; but not for the purpose of defeating the deed or recovery on the covenants."

Therefore, we hold that aside from the question of fraud or mistake parol evidence is not admissible to show that a covenant against encumbrances, where no exception is contained in the deed itself, was not intended by the parties to apply to a particular encumbrance.

It followed that the judgment must be reversed and, the case having been fully developed, judgment will be entered here for $99.10, the amount sued for.

MILLER BROS. v. McCALL CO.

37 Okla. 643. (1913)

Opinion by Brewer, C. The McCall Company, a corporation, sued Miller Bros., a partnership, in the District Court of Oklahoma County for a balance due for goods sold and delivered, in the sum of $909.10, under a written contract between the parties, and for damages on account of a breach of the contract by Miller Bros.

The cause was tried to a jury and a verdict was rendered in favor of the plaintiff for $909.10, which was the amount of balance due for goods received by defendants, less payments made.

The defendants below appealed the case under 27 separate assignments of error.

On the first point, sufficiently presented in the brief, *i. e.*, that the court erred in refusing to permit them to prove that contemporaneously with the execution of the written contract a verbal one was made that defendants should have the exclusive sale of plaintiff's goods in Oklahoma City, it is not suggested in what way this evidence would have been of value to them if admitted. They did not claim that any one else did have the sale of the goods, thus depriving defendants of expected profits; in fact it is admitted that such was not the case. The trial court held that the written contract which detailed its terms and conditions fully and with minute particularity could not be changed or varied in its terms by oral proof, and that to admit the proof offered would have that effect. The court was right. When persons meet and negotiate concerning a contract and discuss its proposed terms and conditions, and finally end the matter by executing a written contract fully covering the subject, it represents the final agreement of the parties, and oral evidence tending to vary, contradict, enlarge, or narrow the terms of the writing is not admissible.

The instrument involved here is admittedly a contract, is free from fraud, accident, or mistake, and covers fully the details of its subject-matter. Under similar circumstances this court in Southard v. Arkansas Valley & W. Ry. Co., 24 Okla. 420, 103 Pac. 755, has ruled:

"For the instrument here involved is admittedly a contract, and under the authorities cited by the plaintiff in error it is not permissible to prove a parol contemporaneous contract to add to, vary, or contradict a written contract, unless under proper allegations as

to fraud, accident, or mistake. This rule is supported by practically an unbroken line of authority where the common law controls. Engelhorn v. Reitlinger et al., 122 N. Y. 79, 25 N. E. 297, 9 L. R. A. 548; Wilson v. Deen, 75 N. Y. 531; Hubbard v. Marshall, 50 Wis. 327, 6 N. W. 497; Undersood v. Simmonds, 12 Metc. (Mass.) 277; Fawkner v. Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230; Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 157, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Baum v. Lynn, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; Ferguson v. Rafferty, 128 Pa. 337, 18 Atl. 484, 6 L. R. A. 33; Parker v. Morrill, 98 N. C. 232, 3 S. E. 511; Eighmie v. Taylor, 98 N. Y. 288; Wigmore on Evidence, sec. 2433."

Affirmed.

WARE v. ALLEN.

128 U. S. 590. (1888)

IN EQUITY. Decree dismissing the bill. Complainant appealed.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

W. P. Ware was the plaintiff below, and from a decree dismissing his bill he has taken this appeal. The action was brought upon a written instrument, of which the following is a copy:

"NEW ORLEANS, Nov. 7th, 1881.

"Ninety days after date we promise to pay W. P. Ware or order ten thousand dollars for two notes of T. P. Ware for five thousand dollars each, dated August 21, '81, one on demand and one at 30 days, provided we are not defeated in the suit against T. P. Ware; if so, this note is void.

"Yours truly,

"(Signed) ALLEN, WEST & BUSH."

The testimony is ample to show that before the paper was signed or agreed upon, it was distinctly understood that it was to be of no effect unless, upon consultation with Judge Harris or J. M. Allen, or both of them, the defendants were assured that the proceeding was lawful and the attachment for the full amount of both claims could be enforced. It is very true that the plaintiff does

not agree to this, in the full extent in which it is thus stated by at least two or three witnesses, but all the circumstances go to confirm the truth of this statement of what actually occurred.

We are quite clear that the testimony does establish the agreement alleged by the defendants to have been made at the various interviews between the persons composing the firm of Allen, West & Bush, or some of them, and the plaintiff, at and before the time when they delivered to him the instrument sued on and received from him the two notes made by his brother, T. P. Ware; that the firm were to have an opportunity to consult counsel, upon whom they relied as to the validity of the transaction; and that if such advice was adverse, then the instrument given by them was to be of no effect.

It also sufficiently appears that they were advised, without hesitation, by the counsel to whom they had reference in those conversations about the agreement, that the transaction was not one that would stand the test of a legal investigation. This is to be considered in connection with the fact that the firm only brought suit for their own claim, and have since returned, or offered to return, the notes of W. P. Ware, which were given him by his brother and delivered to them when the paper was executed.

We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question or contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter.

The present case is almost identical in its circumstances with that of Pym v. Campbell, in the Court of Queen's Bench, 6 Ell. & Bl. 370, 373. The defendants in that case had signed an agreement for the purchase of an interest in an invention, which the evidence showed was executed with the understanding that it should not be a bargain until a certain engineer, who was to be consulted, should approve of the invention. There was a verdict for the defendants, which was sustained, and the following language was used by Erle, J., on discharging the rule to show cause: "I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was ad-

mitted to show that it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. * * *

"If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

In this view the other judges, including Lord Campbell, Chief Justice, concurred, holding that it having been explained to the plaintiff that the defendants did not intend the paper to be an agreement until the engineer had been consulted, and his approval obtained, and was signed only because it was not convenient for them to remain, it was therefore no agreement, the plaintiff having assented to this and received the writing on these terms.

Affirmed.

FARWELL v. ST. PAUL TRUST CO.

45 Minn. 495. (1891)

Plaintiffs presented a claim of $44,374.02, with interest, against E. Allen & Co., insolvents, to the defendant, which was receiver of the insolvent firm, which claim was wholly disallowed by it. Plaintiffs thereupon appealed to the district court for Ramsey county, where the action was tried before Kelly, J., who ordered judgment allowing the claim to the amount of $31,444.49. Plaintiff's appeal from the judgment.

COLLINS, J. Allen and Levinson were general partners, looking after a mercantile business in St. Paul. Appellants were engaged in the wholesale trade in Chicago, where Ettelsohn resided. E. Allen & Co., the insolvents, were dealing quite extensively with appellants, and Ettelsohn was attending to nearly all of their part of the business. E. Allen & Co. had an opportunity to sell a bill of goods to Long & Glennon, traders at Mankato, Minn., upon time. Ettelsohn called upon appellants in reference to such a sale, and it was agreed that if the sale was made the latter would take Long & Glennon's notes upon account, when indorsed by Ettelsohn personally and by

his firm. The sale was made, and the purchasers executed 13 promissory notes, bearing date April 9, 1888, payable to their own order at intervals of 15 days, the first 235 days from date. These notes were then indorsed by Long & Glennon, delivered to Allen & Co., and immediately forwarded to Ettelsohn, who at once placed his own name and that of the firm upon the back of each, and delivered them to appellants, with the understanding that they should be discounted. This was done by appellants, and the trial court found as a fact that the proceeds were applied by the latter in payment of the balance then owing appellants by Allen & Co. on account of goods sold between September 1 and December 31, 1888. These notes were made payable at the office of the makers at Mankato, but were not presented there or elsewhere for payment as they matured. On January 19, 1889, Long & Glennon made an assignment under the insolvency act, and then removed from the state. To avoid the effect of a failure to present the notes at maturity, to give notice thereof, and of the makers' default, appellants offered to prove on the trial that, at the time of the indorsement, demand upon the makers at maturity, notice thereof, and of non-payment, were verbally waived by the indorsers, Allen & Co. The question is by no means a new one, and goes to the competency, as between indorser and indorsee, of testimony tending to show that contemporaneously with the indorsement, there was a parol agreement which materially changed the contract from what it appeared to be, and relieved one of the parties from the performance of certain acts otherwise resting upon him. To put it in other words, the object of their proposed testimony was to transform the contract from one of conditional to one of absolute liability.

From the earliest history of the state this court has steadily resisted the attempts which have frequently been made to vary or explain by parol the ordinary indorsement of a promissory note, by means of which the usual liability and contract of the indorser might be enlarged or diminished, made greater or less, as interest demanded. The most notable of the earlier cases was that of Kern v. Von Phul, 7 Minn. 341 (426), where a regular indorser in blank sought to show that he was an indorser without recourse. We do not feel called upon to review this line of cases, but content ourselves by saying that, while this precise question was in neither, it was practically settled by the reasoning and conclusion in the cases of First Nat. Bank v. Nat. Marine Bank, 20 Minn. 49 (63); Barnard v.

Gaslin, 23 Minn. 192; and Knoblauch v. Foglesong, 38 Minn. 352 (37 N. W. Rep. 586).

The contract of indorsement is twofold,—that of sale and transfer, and that of conditional liability. When in blank, as in the case at bar, all of the authorities concur in saying that a well-defined contract has been made, as full and complete as if explicitly expressed in writing. On what principle can it be urged, then, that testimony which would be incompetent and inadmissible to vary, alter, or control a written agreement can be receivable to vary, alter, or control, and even to destroy, the contract entered into by the regular indorser in blank? And if there is any rule of evidence, save in a few exceptional cases referred to in First Nat. Bank v. Nat. Marine Bank, *supra*, whereby parol testimony may be received to vary or alter the contract, at what point short of that which may totally destroy it can the line be drawn? The contract is admittedly of the same force as though it were reduced to writing, and for that reason it can only be limited or enlarged or impeached with safety by the same class of testimony. If the indorser wishes to qualify his liability, apt words are in common use which he must adopt, or he must in some other manner clearly indicate that his indorsement is limited to a transfer of the paper, and nothing more. If a transfer of title is desired, with a complete and unconditional assumption of liability by the indorser, equally as apt and common phrases are at hand which may be written above the indorser's signature, and the indorsee must see to it that they are used, thus relieving the transaction of its doubt and uncertainty. We regard it as of great importance that the rule respecting negotiable paper should be clear, and the whole story of its obligation should appear upon it. The indorsee must not be permitted, as against the indorser, to show that at the time of the indorsement it was verbally agreed that presentment for payment, notice thereof, and of non-payment, need not be made or given. Bank of U. S. v. Dunn, 6 Pet. 51; Renner v. Bank of Columbia, 9 Wheat. 581; Dale v. Gear, 38 Conn., 15; Bartlett v. Lee, 33 Ga. 491; Barry v. Morse, 3 N. H. 132; Charles v. Denis, 42 Wis. 56; Bank of Albion v. Smith, 27 Barb. 489; Campbell v. Robbins, 29 Ind. 271; Rodney v. Wilson, 67 Mo. 123; Hoare v. Graham, 3 Camp. 57; Free v. Hawkins, 8 Taunt. 92.

Judgment affirmed.

PALLISTER v. CAMENISCH.

24 Col. App. 79. (1912)

The facts in this case, so far as we deem them important, are substantially as follows: Pallister, the appellant, defendant below, purchased a dairy from Camenisch, appellee, plaintiff below, inducing Camenisch to accept as part payment for said dairy a promissory note for $2,500, payable to Pallister and signed by Benjamin W. Ladd and S. D. Moss. The note was taken by Camenisch at its face value, with the accrued interest, and Pallister was given credit on the purchase price of the dairy for the amount. The note was endorsed by Pallister, "without recourse," and delivered by him to Camenisch. Up to this point the facts are undisputed. On substantially all other questions of fact the evidence is in sharp conflict.

The briefs are limited to the discussion of two questions, and we shall accordingly limit our consideration of the case. The first cause of action (the only one we shall consider), is based on wilful or actual fraud. In it, plaintiff charges defendant with liability, because of wilful and fraudulent misrepresentations made by the defendant, and deceit practiced by him upon the plaintiff.

Counsel for appellant in their brief contend, first, that since Pallister endorsed the note, "without recourse," he thereby made it plain that he would not be responsible for its payment; that such an endorsement constituted a written contract, and measured his full obligations, or rather, worked his release from all further obligations in the premises. In other words, it is contended that in writing he declined to be bound in any way for and on account of the note. Hence, they say, to attempt to hold him liable by reason of any oral statement that he may have made at or before the date of transfer, would be to vary the terms of a written contract by oral agreement. Appellant further contends that he ought not to be held liable for any misrepresentations he may have made to appellee, for the reason, as he says, that appellee, having undertaken to investigate and ascertain for himself the financial condition of the maker of the note, and no artifice being used to prevent such investigation from being full and complete, the conclusive presumption is that the appellee relied upon the result of his own investigations rather than upon the appellant's statements. Neither of these arguments impress us as being sound under the law applicable to this case, and the facts disclosed on the trial. In appellant's brief appears the following:

"That his, (appellant's) endorsement of a negotiable instrument, whether the endorsement be general or qualified, is a full and complete contract with full and complete agreements as to the covenants of the endorser, and is not subject to be varied or attacked by parol evidence." This statement, and the authorities cited in support thereof, have no application to the case at bar. If appellee had sued appellant as endorser of the note, or by reason of the fact that he had endorsed it, then the statement quoted, and the authorities cited, would be applicable. To illustrate: Had Moss's financial condition at the time the alleged false representations were made, been substantially as represented by appellant, but thereafter, through adverse circumstances, he had lost his fortune and been reduced to the state financially in which he really was at the time these representations were made; or had Moss refused, through dilatoriness, or from other ulterior motives, to pay the note when it became due, the endorsement of the appellant, "without recourse," would have barred recovery against him. Under the state of facts assumed here by way of illustration, the contention of appellant and his authorities would be sound. But we have no such case before us. It may be conceded that had appellant, before or at the time of endorsing the note, said to appellee: "Now, I am going to endorse this note 'without recourse,' but, nevertheless, if the defendant does not promptly meet his obligations and take up the note at maturity, I will, notwithstanding I have endorsed the note 'without recourse,' see that you are paid," the appellant could not have been held liable by reason of such oral undertaking or statement, but it by no means follows from this concession that one may make false representations concerning a material fact affecting the value of a note which he is seeking to negotiate, and then escape responsibility for his representations simply by writing the words, "without recourse," after his endorsement.

We perceive no reason, either in law or in common sense, why one who makes false representations concerning the payor of a promissory note for the purpose of giving to the note he is attempting to negotiate a false or fictitious value, ought not to be held responsible for his statements in all respects as though such statements had been made of and concerning real estate or personal property of any character. To so hold does not involve any doctrine of the law merchant or the provisions of our negotiable instruments act, as counsel for appellant seem to think.

Stripped of its verbiage, and disregarding all specious and subtle

reasoning, the situation is simply this: Pallister received valuable property from Camenisch for a worthless piece of paper; his false representations led appellee to conclude that the paper was worth its face; but for these false representations, appellee would not have closed the transaction and accepted the note. Under these circumstances, does the law permit Pallister to retain the property and force Camenisch to keep the worthless paper? We think not.

Judgment affirmed.

SWAYNE v. FEL ICE.

84 Conn. 147. (1911)

Action to recover rent, and damages for alleged breaches of covenants in a lease, brought to the City Court of New Haven and tried to the jury before Mathewson, J.; verdict and judgment for the defendants, and appeal by the plaintiff for alleged errors in the rulings and charge of the court. Error and new trial ordered.

HALL, C. J.

One of the answers to all the counts alleges, in substance, that the plaintiff fraudulently procured the defendants to execute the lease in question by representing to them that he would build a dwelling-house and dig a well upon the premises for the use of the defendants, and would incorporate such agreement in the written lease to be prepared, and by falsely and fraudulently stating to the defendants, who were ignorant and unable to read English, that such a provision was incorporated in the written lease which they signed; that the plaintiff refused to build the house and dig the well, and thereby prevented the defendants from using or occupying the premises, and compelled them to abandon them, which they did after due notice to the plaintiff.

The reply denies the allegations of fraud.

The testimony received of the defendant Ferrucci, that the plaintiff orally promised to build a house and dig a well, was inadmissible for the purpose of proving such a promise of the plaintiff as constituting in itself a defense, or of proving any agreement of the parties respecting the defendants' occupation of the premises or the conditions under which the defendants were to pay the rent reserved, different from those stated in the written lease. Such testimony

was, however, admissible in support of the averments of fraud contained in the answer, when offered in connection with evidence that the plaintiff promised to have such agreement incorporated in the written lease, and evidence that he falsely represented that it was, in fact, contained in such lease. As we read the record it was only admitted for the latter purpose, and in connection with evidence of the character just described.

Reversed and a new trial ordered on another ground.

FORSYTH MFG. CO. v. CASTLEN.

112 Ga. 199. (1900)

COBB, J. Castlen brought suit against the Forsyth Manufacturing Company upon a contract of which the following is a copy: "This agreement made and entered into this the 25th day of April, 1898, by and between the Forsyth Manufacturing Company of the first part, and A. W. Castlen of the second part, both of the county of Monroe and the State of Georgia, witnesseth: that the party of the first part hereby agrees to pay the party of the second part six cents per pound for one hundred and fifty bales of lint-cotton to be delivered at the warehouse of said Forsyth Manufacturing Company on the Central Railroad just above Forsyth, in good merchantable order, at times below set forth. The party of the second part hereby agrees to deliver at the place above designated one hundred and fifty bales of lint-cotton, said cotton to be delivered to the Forsyth Manufacturing Company as follows: fifty bales in September, fifty bales in October, and fifty bales in November, 1898, at the place above set forth, and in good merchantable order, all bales to weigh more than 450 pounds each; and should the party of the second part fail or refuse to furnish the full amount of fifty bales each month as above set forth, then the second party forfeits one half cent per pound for each pound not delivered at the end of each month of fifty bales." This contract was signed by both parties mentioned. At the trial it appeared that Castlen was a cotton-planter, that this fact was known to the president of the defendant company, and that at the date the contract was entered into Castlen had upon his land cotton planted and growing. It also appeared that Castlen had delivered to the defendant one hundred bales of cotton, which were raised upon his

place, and which were received by the defendant and paid for under the contract. Six bales raised on the plaintiff's place were delivered and received in due time, but have never been paid for. The plaintiff tendered to the defendant, in November, a sufficient number of bales to complete the contract; but the defendant company refused to receive and pay for these bales, on the ground that they were not raised upon the land of Castlen. This action is brought to recover for the six bales of cotton which were received and not paid for, and for damages on account of the failure to receive and pay for the number of bales tendered in November which were necessary to complete the contract. The jury under the charge of the court returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled. The case is here upon a bill of exceptions assigning error upon the decision of the judge overruling a demurrer to the petition, and upon the judgment refusing to grant a new trial.

The Civil Code declares that parol evidence is inadmissible to add to, take from, or vary a written contract, or to contradict or vary the terms of a valid written instrument. Civil Code, secs. 3675, 5201. When parties have reduced the agreement between them to writing, they must abide by the terms of the writing, whatever they may be, and nothing in the writing can be contradicted or varied by parol evidence. If, however, "a part of a contract only is reduced to writing (such as a note given in pursuance of a contract), and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible." Civil Code, sec. 3675 (1). "To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential. First, the writing must appear on inspection to be an incomplete contract; and second, the parol evidence must be consistent with and not contradictory of the written instrument." Bradner, Evidence (2d ed.), 303. See also Underhill, Ev. sec. 209, 307; Smith, Ev. 214. And a party is at liberty to prove "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them." 2 Whart. Ev. sec. 1026, p. 203. See also Smith, Ev. 553; 1 Gr. Ev. (16th ed.) sec. 284a, p. 413; Browne, Parol Ev. sec. 50; McKelvey, Ev. sec. 277. It appears from the authorities above cited, that, in order to render parol

evidence admissible for the purpose of making complete an incomplete contract, the fact that the contract is incomplete must appear upon the face of the contract by reason of a patent ambiguity, or, although apparently complete on its face, in the light of evidence showing the circumstances surrounding the parties at the time the contract was executed, a latent ambiguity that it may in like manner be relieved. Civil Code, secs. 3675, 5202. The rule is thus stated in McMahon v. Tyson, 23 Ga. 43: "When a writing is such that something more than what is expressed by it is to be implied from it, parol evidence of anything not inconsistent with that unexpressed something is admissible." In that case it appeared that a note was given in consideration of "rent," and parol evidence was admitted to show what was the subject-matter of the contract to rent. In Johnson v. Patterson, 86 Ga. 725, the ruling in McMahon v. Tyson was followed, and it was held that a written contract, silent or ambiguous as to certain matters, may, as to them, be explained by parol evidence not conflicting with anything plainly expressed in such contract. In Barclay v. Hopkins, 59 Ga. 562, it was held: "Where the entire contract does not purport to be in writing, parol testimony is admissible to show all other terms and conditions, not inconsistent with the written part." There are many decisions by this court relating to this subject, but it would be useless to refer to or cite all of them. Enough have been cited to show that this court has recognized the rule, that in order to allow parol evidence to be admitted to show a collateral agreement it must appear, either from the contract itself or from the surrounding circumstances, that the contract is incomplete, and what is sought to be shown as a collateral agreement must not in any way conflict with or contradict what is contained in the writing. An examination of the cases decided by this court will show, we think, that this rule has been steadfastly adhered to. There may be some confusion in regard to the way in which it has been applied in some cases, and possibly there have been erroneous applications of the rule; but no case has been called to our attention where there has been any departure from this rule.

It follows from what is above said, that the court did not err in refusing to allow the defendant to prove, as a collateral agreement between himself and the plaintiff, that the cotton specified in the contract was to be raised on the lands of the plaintiff. The contract between the parties evidenced by the writing calls for a certain number of bales of cotton of a certain description, and for no particular cotton. It is clear that, so far as the terms of the contract

are concerned, the parties did not intend that the plaintiff should be limited to cotton raised by him. It was a plain and unambiguous contract for the delivery of any cotton, answering to the description specified in the contract, which the plaintiff might see fit to offer to the defendant at the times specified in the contract. Such being the legal effect of the paper, parol evidence tending to show that the real contract was that the cotton was to be raised on the land of the plaintiff contradicted and varied and altered the very terms of the written instrument. There being no patent ambiguity in the contract, of course parol evidence was not admissible on the ground that such an ambiguity might be explained. Evidence showing that it was the intention of the parties to make a contract whereby plaintiff should be confined to cotton raised on his own lands did not raise a latent ambiguity, but directly impeached an unambiguous instrument. If such evidence could be held to raise a latent ambiguity, the rule prohibiting the introduction of parol evidence would be, in effect, abrogated. If such was the intention of the parties, and this was omitted from the contract by fraud, accident, or mistake, of course the defendant would have a right in a court of equity to reform the contract, but he cannot in a court of law be allowed in this manner to contradict the terms of a plain, unambiguous paper by parol evidence.

There was no error in overruling the defendant's demurrer, nor in the rulings on evidence complained of in the motion for a new trial.

Judgment affirmed. All the Justices concurring.

ANTON KNOBLAUCH v. ELIZABETH E. FOGLESONG.

38 Minn. 352. (1887-88)

After the decision of the former appeal in this action (37 Minn. 320), the action was tried in the district court for Hennepin county, before Rea, J., and a jury, and a verdict was directed for plaintiff, who appeals from an order granting a new trial.

GILFILLAN, C. J. Action against the defendant Crossman as maker, and the defendant Foglesong as indorser, of a promissory note made by Crossman, payable to the order of Foglesong, and by the latter indorsed in blank. At the trial, Foglesong offered to prove an

oral agreement, made at the time of the indorsement, between the indorser and indorsee, this plaintiff acting for the latter, that the indorsee would look for his pay to the security only given by the maker with the note (to wit, a mortgage upon real estate), and not trouble or sue the indorser; the plaintiff stating that he wanted the name on the back of the note because it was made payable to order, and the indorsement was necessary, and should be treated simply as passing the title to the notes; and also offered to prove by parol in substance, that, prior to the making of the note, Crossman and Foglesong were negotiating for the sale of certain real estate by the latter to the former, when the former made an offer for the real estate of $2,000 in cash, $2,000 in other lands, and $2,250 in notes (one of them the note in suit), to be secured by a mortgage on the real estate; that Foglesong objected on the ground that the mortgage would be a second mortgage, whereupon plaintiff, who was present and had heard the negotiations and offer, agreed that, if Foglesong would take the notes and mortgage at $2,250, he would purchase them, and count on the notes. Each of these offers was objected to as incompetent and immaterial, and the objection was sustained. After a verdict for the plaintiff, the court below, conceding that it had erred in excluding the evidence granted a motion by defendant for a new trial.

The objection to each offer was rightly sustained.

BLANCHARD v. RIDGEWAY.

179 Mich. 491. (1914)

MOORE, J. The plaintiff sued defendant upon three notes.

From a judgment in favor of the plaintiff, the case is brought here by writ of error.

The defendant attempted to show by the cross-examination of the plaintiff for what consideration the notes were given, and that they were drawn by plaintiff, and were for a larger amount than the debt of defendant. Defendant also attempted to show by his own testimony that the facts stated in the notice under his plea, which we have quoted were true. That plaintiff drew the notes for a larger amount than he should, and shoved them over to the defendant, who signed them, relying upon the statements of the plaintiff that they were drawn for the proper amount. This testimony was excluded

upon the theory that the amounts stated in the notes must control, and that to permit the testimony would be to allow a written instrument to be contradicted or varied by parol. It must be remembered that the plaintiff is the payee. No third party is interested.

The testimony was competent under Anderson v. Walter, 34 Mich. 113; Soper v. Peek, 51 Mich. 563 (17 N. W. 57); Maltz v. Fletcher, 52 Mich. 484 (18 N. W. 228); Macomb v. Wilkinson, 83 Mich. 486 (47 N. W. 336); Phelps v. Abbott, 114 Mich. 88 (72 N. W. 3); Brown v. Smedly, 136 Mich. 65 (98 N. W. 856), and the many authorities cited in the last-named case.

As this conclusion must reverse the case, it will not be necessary to refer to the other assignments of error, as the same situation cannot arise again.

The judgment is reversed, and a new trial ordered.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

CENTRAL SAVINGS BANK v. O'CONNOR.

132 Mich. 578. (1903)

MONTGOMERY, J. This action is brought upon two promissory notes aggregating $1,523.47, made by the defendant O'Connor and indorsed by the defendant Hammond. The notes bear date February 1, 1901. The plaintiff made its case by introducing them in evidence. The defendants then offered to show by a parol agreement made at the time said notes were executed, and which is set out in a notice under the general issue, in substance as follows: That the notes were given for the amount of a chattel mortgage which plaintiff held upon the property of the J. R. Pearson Company, which property defendant O'Connor had purchased; that the title to said notes never passed to said plaintiff; that the notes were delivered to plaintiff upon the clear and distinct understanding and condition, agreed to by said plaintiff that in case the said J. R. Pearson Company should thereafter be forced into bankruptcy by any of its creditors, upon proceedings instituted by them for that purpose, and adjudicated a bankrupt, said notes would thereupon, in the event of the happening of such contingency, become and be null and of no effect, and were not to be paid, and that it was upon said condition said notes were

delivered to said plaintiff; and that it accepted and held, and still holds, them, and each of them.

The evidence of the defendants upon this subject, which is most favorable to the defense, is, in substance, this: That the notes were executed in consideration of the transfer by the plaintiff to the defendant of a chattel mortgage and accompanying note of the J. R. Pearson Company, which note was indorsed by J. R. Pearson, F. H. Crawford, and A. J. Franklin. Defendant testifies that, after the notes were signed and indorsed he then said to Mr. Fox, plaintiff's representative:

"These notes are delivered to you on the condition that if this concern is put in bankruptcy by reason of any of these creditors petitioning because of this chattel mortgage having been given, or an execution having been levied and the goods sold under the execution, which are both acts of bankruptcy, then the notes are to be null and void; and Mr. Fox says, 'That is my understanding of it, and I accept them so;' and he says, 'You know that there is nothing going to be done about it.'"

On the trial of the case the court submitted the case to the jury upon the instruction that, if the claim set up by the defense was true, the plaintiff could not recover. The jury returned a verdict for the defendants. Afterwards a motion for a new trial or for the entry of a judgment *non obstante veredicto* was entered, and the court, after consideration, entered a judgment for the plaintiff *non obstante veredicto*. The defendants bring error.

The meritorious question is whether the defense set out in this notice is one which can be established by parol testimony. It is doubtless true, as contended by the appellants counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event. Brown v. St. Charles, 66 Mich. 71 (32 N. W. 926); Burke v. Dulaney, 153 U. S. 228 (14 Sup. Ct. 816). On the other hand, the rule is firmly established that where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of Hyde v. Tenwinkel, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from

an absolute and specific promise to a defeasible engagement was inadmissible. The same rule has been followed, one of the recent cases being Phelps v. Abbott, 114 Mich. 88 (72 N. W. 3); Burns & Smith Lumber Co. v. Doyle, 71 Conn. 742 (43 Atl. 483, 71 Am. St. Rep. 235). We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument. If we adopt the testimony of the defendant as correctly stating the transaction, and more certainly if we adopt the terms of the notice of defense by which the defendant was bound, these notes were delivered to take effect presently, but upon the alleged parol agreement that they were to become void in the event that a certain contingency should happen. This is no more than averring that plaintiff entered into a contemporaneous parol agreement that, while the defendant's obligation bound him to pay absolutely the sums of money at specified times, yet in a certain contingency this sum should not be payable at all, and the notes be redelivered.

It is suggested, also that there was a total failure of consideration. This cannot be held, for the reason that there was transferred to the defendant, in consideration for the notes the chattel mortgage and promissory note of the J. R. Pearson Company, which note had indorsers against whom it would be enforceable. There was no absolute and total failure of consideration, and no defense of partial consideration was noticed under the general issue.

We think, however, that the practice adopted in this case was mistaken. There is no verdict which supports the judgment entered *non obstante veredicto*. Had there been a special verdict inconsistent with the general verdict, such a judgment might have been proper.

We think the case should be reversed and remanded for a new trial. No costs will be awarded to either party on this hearing.

The other Justices concurred.

WHEATON ROLLER-MILL COMPANY v. JOHN T. NOYE MANUFACTURING COMPANY.

66 Minn. 156. (1896)

MITCHELL, J. This action was brought to recover damages for the breach of a warranty of a steam engine, boiler, etc., furnished and set up by defendant for the plaintiff in its mill. The alleged warranty was that *the machinery was well made, of good material, and capable of operating plaintiff's mill at full capacity;* the part italicized being all that is material on this appeal. It appeared on the trial that the machinery was furnished under the written contract found in full in the paper book, at folios 52 to 57, which is so long that we shall leave it to speak for itself, without attempting here to state its provisions. The plaintiff then offered certain parol evidence, the exclusion of which by the court forms the subject of the assignments of error.

The second assignment of error is that "the court erred in sustaining defendant's objection to plaintiff's offer to prove that there was an express oral warranty." This refers to the complex and somewhat obscure and indefinite offer found at the bottom of page 12 of the record.

Some parts of this offer were clearly inadmissible, and for that reason, if no other, the defendants objection was properly sustained. For example, the offer, in part, was to prove that there was an oral agreement that the machinery should fulfill the conditions of the written agreement. That was necessarily one of the terms of the written agreement itself, whether the conditions referred to in the offer were expressed or implied. But what we infer the assignment of error means is that the court erred in refusing to allow the plaintiff to prove an express oral warranty as alleged in the complaint, that the machinery would be capable of operating plaintiff's mill at its full capacity. It will be observed from its language that the offer was to prove an oral warranty made in connection with, and at the same time as, the written agreement. Assuming that such a warranty as suggested could be spelled out of the offer, and that it was made in proper form, still the evidence was properly excluded under the familiar rule that parol evidence is inadmissible to vary the terms of a written contract.

Plaintiff's contention is that it does not fall within that rule; that the offer was merely to prove a separate oral agreement as to a

matter on which the writing was silent, and which was not inconsistent with its terms. The rule thus sought to be invoked is one which both courts and text writers have found some difficulty in formulating so as to be at once complete as well as accurate.

All the authorities are substantially agreed that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto. But the point upon which the courts have sometimes differed is as to how the incompleteness of the written contract may be made to appear. Some cases seem to go to the length of holding that this may be done by going outside of the writing, and proving that there was a stipulation entered into but not contained in it, and hence that only part of the contract was put in writing. If any such doctrine is to obtain, there would be very little left of the rule against varying written contracts by parol. Such is not the law. Other cases seem to go almost to the other extreme, by holding that the incompleteness of the writing must appear on the face of the document from mere inspection. But to furnish a basis for the admission of parol evidence the incompleteness need not be apparent on the face of the instrument.

If the written contract, construed, in view of the circumstances in which, and the purpose for which, it was executed,—which evidence is always admissible to put the court in the position of the parties shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there. In short, the true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself; but, in determining whether it is thus complete, it is to be construed, as in any other case, according to its subject matter, and the circumstances under which and the purposes for which it was executed.

Applying the rules which we have laid down, parol evidence to prove a warranty, which was part of the prior or contemporaneous

agreement, and about which the written contract was silent, was clearly inadmissible.

Order affirmed.

TOWNSEND v. FONTENOT, Sheriff.

42 La. An. 890. (1890)

McENERY, J. This is a suit to restrain the execution of a judgment of the District Court of the parish of St. Landry in a suit entitled J. U. Payne & Co. v. A. C. Townsend.

The ground for the injunction is that the execution was prematurely issued as the judgment creditors had granted a stay of execution until the 1st day of January, 1890. Damages for the illegal seizure are claimed to the amount of $9,000 against the judgment creditors, and the Sheriff *in solido*.

Henry M. Payne sold to A. C. Townsend the undivided half of the Anchorage plantation, part cash and the balance on terms of credit for which notes were executed by Townsend and the usual mortgage and vendor's privilege retained on the plantation, to secure the deferred payments.

The last two of the notes were acquired by Jacob U. Payne & Co., and they brought suit against Townsend on the first maturity of the notes to enforce payment, with recognition of the mortgage and vendor's privilege. The defendant Townsend made no appearance in said suit. When the default was made final and judgment rendered there was inserted and incorporated in the judgment the following statement:

"The attorney of the plaintiff in this suit declares that he has been instructed not to seize or sell said property before the end of the year."

The defendants contend that this statement did not operate as a stay of execution, that it was inserted *ex gratia*, and, as incorporated in the judgment is meaningless.

On this point the defendants offered in evidence the testimony of J. U. Payne, Thomas H. Lewis and R. W. Foster, to explain the insertion of said statement in the judgment. It was properly excluded by the District Judge, as no parol testimony can be received to vary, contradict, explain or interpret a judgment. The defendants' counsel.

however, states that such was not the intention of introducing the evidence, and its effects would not be to contradict or vary said judgment, but to show that the defendants were not controlled by any vindictive or malicious motives in executing the judgment. But in this we think he was mistaken, and the District Judge viewed the effects of the rejected testimony in its proper bearing.

It is immaterial in consideration of this question how the statement got in the judgment. It was prepared and written by plaintiffs' counsel, and must have been placed there by plaintiffs' instructions. It is sufficient to show that it was there, and that it formed a part of the judgment, as binding and authoritative as any other recital in it.

JOHNSON v. MANUFACTURING CO.

165 N. C. 105. (1914)

CLARK, C. J. This is an action to recover damages for trespass on the "White" tract of land, which the plaintiffs claim title to under the will of Sallie E. Ward, described as "lying on the White Oak road, and adjoining the lands of Patterson Ruffin, A. S. Rascoe, and others, and containing 191 acres."

The second and third exceptions are that the court refused to allow the deed from Sallie E. Ward to W. A. Ward to be read to the jury, and excluded all evidence offered to identify the land described in it and tending to show what the 50 acres were included in the 191 acres of the "White" tract claimed by plaintiffs. This deed from Sallie E. Ward had been put in evidence without objection; but when the defendant offered to read it to the jury the court excluded it, holding that, as a matter of law, it was "void for lack of description," and that "the deed did not describe any land." The description is "50 acres adjoined by P. R., bound on the White Oak road and joining A. S. Rascoe and P. Ruffin.". The deed has apt words of conveyance and is sufficiently formal. It does not convey an indefinite 50 acres "out of" the White land but a tract of 50 acres which was a part of the White land, "on the White Oak road" adjoining the lands of A. S. Rascoe and P. Ruffin.

We think his honor erred in excluding parol testimony to identify this tract of land. It was a latent and not a patent ambiguity. It may be that the defendant could have shown that the boundaries had been actually run and marked. At any rate, it was not impossible to lay off

50 acres of the "White" tract, taking the White Oak road as one boundary. The other boundary in such case (unless it had been actually run and marked) would have been parallel to said White Oak road and far enough from it to make up the acreage of 50 acres. In Farmer v. Batts, 83 N. C. 387, there is an interesting discussion in which the cases are cited, where the words of description have been held too indefinite to admit of parol testimony, and other cases in which the description has been held sufficient. We think this case falls in the latter class.

Among the later cases in point is Hudson v. Morton, 162 N. C., 6, in which the court held that a description "being one acre of land adjoining L., in one corner of the field now turned out and lies near and including the spring, it being a portion of the H. tract conveyed by D. to M.," was held sufficiently definite to permit of parol testimony to fit the description to the deed. Among the cases cited therein is Edwards v. Deans, 125 N. C. 61, where a deed for "30 acres in the western part of a tract of 112 acres" was held sufficient to offer proof of a survey of said 30 acres, followed by possession. In Perry v. Scott, 109 N. C. 374, the language, "on the south side of Trent River adjoining the lands of Colgrove, McDaniel and others, containing 360 acres," was held not too vague and indefinite to permit identification by parol.

In Stewart v. Salmonds, 74 N. C. 518, Pearson, C. J. says that the words "29 acres off the north end of a tract of land containing 129 acres, of an irregular figure, and bounded by eight lines, all straight, and with definite courses and distances can be ascertained and cut off with mathematical precision. The question is, Can the 29 acres be identified by the rules of mathematics so that the cutting off of the 29 acres will involve no discretion, but be a mere ministerial act? We think the 29 acres can be identified by a mere ministerial act." This case has often been cited and approved; see Anno. Ed.

In Warren v. Makely, 85 N. C. 12, the description is: "A parcel of land lying and being in Currituck Township, near the head of Smith Creek, being the easternmost portion of the farm I purchased of my brother, John E. Fortescue, known as the Russel land, containing 100 acres." This court held that the court below properly refused to tell the jury, from a simple inspection of the deed, that the 100 acres could not be ascertained, and added: "If the larger tract be known, it is apparent the area of 100 acres can be cut off from its eastern part by a line running due north and south." To similar purport is Webb v. Cummins, 127 N. C. 41, and Shaffer v. Hahn, 111 N. C., at

p. 11. Here the description, "50 acres on the White Oak road," is sufficient to admit of parol proof.

In Cox v. Cox, 91 N. C. 256, the court held that the acreage is material in questions of doubtful boundary. Here the 50 acres is a part of the "White" tract and is on the White Oak road. That is to say the land being a part of the "White" tract, and one boundary, "the White Oak road," being given, as well as the adjoining owners, P. R. Ruffin and A. S. Rascoe, parol testimony was admissible either to show an actual survey, if one had been made, and possession thereunder, as in Edwards v. Dean, *supra*, or the tract could be located, as we have said, by running a line parallel with the White Oak road so as to cut off 50 acres, as in Stewart v. Salmonds and Warren v. Makely and other cases, *supra*.

As these errors require a new trial, it is unnecessary to discuss the other exceptions.

Error.

WHITBY v. MOTZ.

125 Minn. 40. (1914)

Ella Whitby petitioned the probate court for Wabasha county that in its final decree in the matter of the estate of George Motz, deceased, it assign to her such portion of the estate of decedent as though he had died intestate, petitioner being a daughter and having been omitted from the last will and testament of decedent, and it not appearing that such omission was intentional, Mary Motz, the executrix and residuary legatee of the estate, objected. Ella Whitby, having been omitted from any share of the estate by the terms of the final decree appealed therefrom to the district court for Wabasha county. The appeal was heard before Snow, J., who made findings and ordered judgment affirming the final decree of the Probate Court. From an order denying her motion for a new trial, Ella Whitby appealed. Affirmed.

TAYLOR, C. George Motz and the mother of appellant were married in 1883 and lived together as husband and wife until 1891 when they separated. Appellant was born a few months after the separation and is their only child. Subsequently Motz obtained a divorce on the ground of desertion, and on September 14, 1897, married the respondent Mary Motz, with whom he lived until his death on August 9, 1911,

He left a will by which he gave the respondent all his property except one horse. Appellant was not mentioned or referred to in the will.

From the parol testimony offered by respondent and received in evidence by the court, the court found as a fact "that said omission to provide for appellant in said last will and testament, or to mention her name therein, was intentional and not occasioned by accident or mistake."

Appellant insists: (1) That such parol testimony was not admissible and that the question as to whether she was intentionally omitted must be determined solely from the will itself; (2) that the evidence is not sufficient to sustain the above finding, even if such parol testimony were admissible.

In the revised laws of 1905 our statutes were changed so as to read as follows:

"If any child of a testator, born after the death of such testator, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have taken if the father had died intestate." Section 3668, R. L. 1905 (Section 7259, G. S. 1913).

The second section is so changed that the right of a pretermitted child to inherit is absolute, "unless it appears that such omission was intentional and not occasioned by accident or mistake." Under the original statute the burden was upon the omitted child to show that such omission was unintentional. Under the present statute, when it appears that a child has been omitted, the burden is upon those who claim that such omission was intentional, to establish that fact. The statute contains no restriction as to the manner in which such fact may be shown. Appellant, however, insists that the statute should be construed as if it provided that an omitted child should inherit, "unless it appears *from the will* that such omission was intentional." In other words that the court, in effect, should interpolate the words italicised. It is difficult and frequently impossible to prove the intention of the testator. The legislature has shifted the burden of doing this from the child to the adverse party. If it had intended to go further and to limit the evidence upon the question to the will itself, it would, doubtless, have used appropriate language to express that intention.

Other courts, in construing statutes substantially the same as our present statute hold that parol evidence is admissible for the purpose of showing that such child was intentionally omitted. Coulan v. Doull,

133 U. S. 216; Wilson v. Fosket, 6 Metc. (Mass. 4), 39 Am. Dec. 736; Converse v. Wales, 4 Allen, 512; Ramsdill v. Wentworth, 101 Mass. 125; Lorieux v. Keller, 5 Iowa, 196, 68 Am. Dec. 696; Whittemore v. Russell, 80 Me. 297; Re Atwood's Estate, 14 Utah, 1; Schulz v. Schulz, 19 N. D. 688.

Order appealed from is affirmed.

CRAGIN v. CARLETON.

21 Me. 492. (1842)

Assumpsit on a note, dated February 20, 1838, in favor of the plaintiffs against James H. Carleton, Robert R. Haskins and Romulus Haskins, alleged to have then been copartners, doing business in the name of J. H. Carleton & Co. Carleton and Romulus Haskins were defaulted; and the only question was, whether Robert R. Haskins was liable as a partner.

The note, which was admitted to have been signed by Carleton in the partnership name, was read to the jury. To prove that Robert R. Haskins was a partner, after the introduction of other evidence, the plaintiffs produced and offered in evidence a copy of a judgment against all the defendants, recovered by default, at the return term of the writ, in the Court of Common Pleas for the county of Cumberland, March Term, 1838, in favor of the Oriental Bank, on a note given April 14, 1836, and signed by J. H. Carleton & Co. To the admission of this judgment in evidence the defendant objected. Tenney, J., presiding at the trial, permitted it to be read to the jury, as evidence of the admission of the defendant, R. R. Haskins, that he was a member of that firm. The counsel for the defendant then proposed to prove, that after the commencement of that suit, and before the default, the defendant consulted counsel in reference to a defence thereto, stating to the counsel that he was never a member of the firm of J. H. Carleton & Co. and that he had never in any way authorized the use of his name by that firm; that upon inquiry by his counsel, whether he considered the firm of Carleton & Co. solvent, he stated that he thought it was; and that upon the suggestion by his counsel, that the amount of the demand sued was small, and that the expense of litigating it at such distance would be considerable, whether it would be best to resist it, he concluded,

and so instructed his counsel, to let the action be defaulted. The plaintiffs objected to the admission of this evidence, and it was excluded by the Judge.

The defendant then consented to be defaulted, with leave to move to have the default taken off, if, in the opinion of the court, the judgment was not admissible in evidence, or if the evidence offered by the defendant, and rejected was admissible.

WHITMAN, C. J. The only questions raised by the defendants are, whether a judgment entered against them, as copartners upon default, in a suit between them and persons other than the plaintiffs, was admissible in this case to prove their copartnership; and, if it was, whether the reasons given by one of the defendants, who denies that he was a partner, disclosed by him to his counsel for suffering a default to be entered in that suit were admissible together with the advice of his counsel thereon, by way of showing that the default should not be taken to be a concession that a partnership existed between them. As to the first question, we cannot regard it otherwise than as settled by the case of Ellis v. Jameson, 17 Me. R. 235, that such judgment is admissible. And, as to the other, we are not aware of any precedent in support of such a proposition; but, on the contrary, the rules of evidence seem to be diametrically opposed to it. The effect of judgments is never to be explained by parol; and surely not by the declarations of the parties to them, in opposition to what is obviously imported by them.

Judgment on the default.

DADY v. O'ROURKE.

172 N. Y. 447. (1902)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 3, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

PARKER, CH. J. It is urged on the part of plaintiff that his part of the contract would have been performed by delivering to the trust company all his stock, whether the number of shares was 687 or a much less number, so that if the amount actually owned and held by him had been one-fifth instead of three-fifths, the turning over

of that amount to the trust company would have constituted performance on his part. But we do not so understand the contract. As we read it, he not only agreed to turn over all his stock, but also agreed that the stock holdings thus to be turned over amounted to three-fifths of the entire capital.

One of the rules to be applied in the construction of contracts is that they shall be construed so that all parts may stand together if they are capable of such an interpretation. A covenant in large and general terms may be restrained and narrowed where the intent to restrain and narrow or qualify is apparent from other parts of the same instrument. Thus in Holmes v. Hubbard (60 N. Y. 183), upon the dissolution of a partnership between D. & H., H. purchased D's interest and gave him a bond signed by himself and another conditioned to indemnify D "from all and singular the debts and liabilities" of the firm. At the end of the formal part of the bond were added the words "Liabilities as per schedule of indebtedness hereto attached." This court held that the general terms of the condition were limited and qualified by the added clause; and that the obligers were not liable for a copartnership debt not mentioned in the schedule. That case is in point here and should be controlling.

Still another rule of construction is that the intention of the parties is to be sought in the words and language employed, which are to be read and understood according to their natural and obvious import. (Schoonmaker v. Hoyt, 148 N. Y. 425.)

Applying these rules to the contract before us the conclusion must be reached, we think, that plaintiff agreed to sell his holdings in the ice company, and agreed that they amounted to three-fifths of the entire capital.

Now it must be borne in mind that this is not an action to reform a contract so that it shall voice the agreement the parties intended to make. On the contrary, it is based on the contract *as it was written* with the claim of full performance on the part of the plaintiff, and, therefore, cannot be maintained by evidence that the contract was intended to be a different one, for it is the general rule that when an agreement is reduced to writing, it, as between the parties, merges and overcomes all prior or contemporaneous negotiations upon the subject, and that oral evidence is not admissible to vary, explain or contradict its terms, for the writing is conclusively presumed to contain the whole engagement of the parties. (Stowell v. Greenwich Ins. Co., 163 N. Y. 298.) There are certain exceptions to the rule referred to in that case, but as this case is not within any of them

they need not be referred to. Other authorities to the same effect are Mars v. McNair (99 N. Y. 174); Sanders v. Cooper (115 N. Y. 279); Walton v. Agricultural Ins. Co. (116 N. Y. 317); United Press v. N. Y. Press Co. (164 N. Y. 406).

The evidence was apparently admitted upon the view that the contract was ambiguous and hence that the proof of the facts and surrounding circumstances was admissible in order to aid the court in arriving at the intention of the parties, but as we read it it is clear and unambiguous, and, therefore, to be construed according to its language.

Now, the evidence admitted against the objection of the defendant, some of which we have quoted, was prejudicial to defendant, tending to show that it was the intent of the parties that plaintiff should sell only his interest in the stock of the company, whatever it might be, and as the court found that plaintiffs had fully performed his part of the agreement it must, in view of our construction of the contract, have been based upon the evidence adduced outside of the contract, tending to show that plaintiff only intended to sell and defendant to buy such of the stock of the company as was held and owned by plaintiff.

It follows that the judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, BARTLETT, HAIGHT and VANN, JJ., concur; MARTIN, J., not voting.

Judgment reversed, etc.

STATE v. LOVAN.

245 Mo. 516. (1912)

FERRISS, J. Defendant was convicted in the Criminal Court of Jackson County on an information charging him with the crime of obtaining property by false pretenses, and sentenced to two years in the penitentiary. The information charges that the defendant with intent to defraud one George F. Hannay, did falsely, etc., represent to said Hannay that he, the defendant, and the Ernest Lovan Investment Company owned in fee simple, and free and clear of all incumbrances several parcels of real esttate, described in detail in

the information, and said Hannay was the owner of certain capital in certain corporations, set out in detail.

The testimony for the State developed the fact that at the time when the alleged representations were made by defendant concerning the Morgan county land the same was incumbered by two deeds of trust of several hundred dollars each. Defendant testified that he told Hannay of the existence of these two incumbrances and told him further, that he had an arrangement with the holder of them, Mr. J. J. Swofford, by which he could get them at any time and clear them. Mr. Swofford testified that he held the two deeds of trust on the Morgan county land, and that they had been put up with him by defendant as collateral for a loan. Defendant's counsel asked Swofford, in substance, whether he had a conversation with defendant with reference to surrendering these notes. Objection by the State was sustained. Defendant urges that this ruling was error materially affecting his rights. The State contends that defendant has no standing to urge this assignment, because he made no formal offer to show such arrangement to take up the notes as defendant claimed, and further, that, even if there had been such an arrangement, it would be immaterial. The defendant's counsel sufficiently indicated their purpose, and the court so understood it. The ruling of the court was put upon the ground that such arrangement was immaterial inasmuch as it had not been carried out. We think the objection to this line of inquiry should have been overruled. If an arrangement existed by which defendant could at any time clear the lien of these deeds of trust, that fact would be material upon the question of intent. Defendant had testified, without objection by the State, that he had told Hannay that he had an arrangement with Swofford by which he could at any time get these notes and deeds of trust. We think testimony upon this point from Swofford would be competent, in corroboration of the testimony of defendant. If defendant pledged these mortgages to Swofford, it is fair to assume that he owned them. Suppose he had not pledged them, but was holding them as owner—it is conceded that he had title to the land—and had said, under such conditions, that the land was clear of incumbrances, it would hardly be claimed that such facts could not be shown upon the question of criminal intent. Yet, if he had an agreement by which he could certainly clear the land of these mortgages, although they were hypothecated, and intended so to do, the effect would be practically the same so far as the facts related to a

criminal intent. The ruling of the court was prejudicial error, and must result in a reversal of the judgment.

It is finally urged that the contract read in evidence does not sustain the charge in the information. It was argued that the written contract does no more than bind the defendant to guaranty of title, and does not amount to an assertion of present clear title. If the case depended solely upon the written contract, this point might be worthy of serious consideration but the prosecuting witness swears that the defendant assured him verbally, before the written contract was drawn, that the land was unincumbered.

The rule applied in civil cases in actions upon written contracts, namely that prior conversations and oral agreements are merged in the writing can have no application here. Fraud is not merged in a written contract. [Gooch v. Conner, 8 Mo. 391.] There is no question here as to the contract between the parties or that the writing does not truly state it. Where the written contract itself was brought about by fraud, proof of that fraud may be in parol.

When the parol testimony was offered, the defendant did not object, presumably because counsel saw no grounds for objection. In our judgment, none existed.

Because of the error committed in ruling out the testimony of witness Swofford, the judgment is reversed and the cause remanded.

BROWN, P. J., and KENNISH, J., concur.

SHERWOOD v. SHERWOOD.

45 Wis. 357. (1878)

LYON, J. This is substantially an action to remove a cloud from the plaintiff's title to lot 10 in block 20 in the city of Oshkosh, which, the plaintiff alleges in her complaint was devised to her by her son, the late Daniel O. Sherwood, in and by his last will and testament, which since his death has been duly admitted to probate. The cloud is alleged to haye been produced by the fact that in said will the lot is misdescribed as lot 9 in block 20. It is further alleged that the defendant claims to be the owner of an undivided one-half of lot 10; and facts are stated, showing that his claim is valid, if the lot is intestate estate. The plaintiff prays that the cloud may be removed by correcting the alleged misdescription in the will, and by

the judgment of the court that lot 10 is therein devised to the plaintiff notwithstanding such misdescription. Either of these modes, if adopted, will operate to quiet and confirm the plaintiff's title to lot 10.

An extended examination of the cases and authorities bearing on the question, not only those cited by both of the learned counsel, but many others not cited, has satisfied us that it is not a proper exercise of the powers of a court of equity to reform a will by adding provisions thereto to make the will accord with the real intentions of the testator.

The remaining question is, whether the will admits of the construction that the testator therein devised lot 10 to the plaintiff. One of the rules by which this question must be determined is, that evidence of the intention of the testator, extrinsic to the will itself, is not admissible for the purpose of explaining, construing or adding to the terms of a will; but such intention must be spelled out from the words of the will itself, read in the light of the circumstances surrounding the testator when he made it. In cases where there are inconsistent provisions in the will, evidence of such circumstances is always admissible.

The above rules excluding extrinsic evidence of the intention of the testator has been applied in a large number of cases in which such evidence has been offered to vary or contradict wills, to supply omissions or correct mistakes therein, or to explain patent ambiguities. Wigram lays down the rule as follows: "If a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible; in other words, the judgment of a court in expounding a will must be simply declaratory of what is *in* the will." p. 179. Numerous English cases illustrating the application of the rule are cited in the note 2, p. 182 of the treatise above cited.

In Morgan v. Burrows, *ante*, p. 211, such evidence was held admissible to explain a latent ambiguity; and the distinction is there considered between such a case and those cases which are within the rule. Many American cases in which the rule has been applied, will be found cited in the brief of counsel for the appellant in that case.

We are now to determine whether there is any provision or clause in the will under consideration, from which, when considered in the light of surrounding circumstances, the court can say that it con-

tains a devise of lot 10 to the plaintiff. Inasmuch as the question arises on demurrer to the complaint, we have no knowledge of the contents of the will beyond what is stated in the complaint. It is averred therein that, by mistake, lot 9 is the lot described in the will instead of lot 10, and that the testator "made no other mention or description of lot 10, or of any lot of land in said block 20 except as herein stated." Thus it is substantially alleged that the only designation or description in the will of the lot devised to the plaintiff is "lot 9." Hence there is nothing in the will upon which to predicate a construction that lot 10 was therein devised to her.

It might be otherwise had the testator inserted in his will any other description or identification of the lot which he intended to devise to the plaintiff. For instance, had he devised to her "lot 9 in block 20 occupied by A;" or, "which I purchased of B;" or even "my lot 9 in block 20," and had it appeared that lot 10 alone was occupied by A, or that the testator purchased lot 10 alone of B, or that lot 10 was the only lot owned by the testator in block 20, in either case extrinsic evidence would be admissible to show the fact; and if established, the court would be justified in construing the will as containing a devise to the plaintiff of lot 10. This does not contravene the rule which rejects extrinsic evidence of the intention of the testator when offered to vary or add to a will; for in either of the cases above supposed, the will itself contains two inconsistent descriptions of the lot devised, the one true and the other false; and the court would merely resort to extrinsic evidence to ascertain which was the true description, and would construe the will accordingly. This is but an application of the familiar maxim, *falsa demonstratio non nocet* sanctioned by all of the authorities. Nearly all of the cases cited by the learned counsel for the plaintiff sustain these views.

Our conclusion upon the whole case is, that the complaint in its present form does not state a cause of action, and that the demurrer thereto should have been sustained.

PROVIDENT SAV. LIFE ASS'N OF N. Y. v. SHEARER.

151 Ky. 298. (1912)

CARROLL, J. In March, 1896, the appellee, Shearer, procured from the appellant company a ten year term policy for $5,000, in which the company obligated itself to pay the amount of the insurance only in the event the insured died before the expiration of the ten years. In October 1905, a few months before this policy expired, the appellant company proposed to issue to Shearer a new form of insurance for $5,000 under the twenty payment life plan, the policy to be dated back to March, 1896, in order that Shearer might have the benefit of the premium rate based on his age in 1896, in place of the higher rate he would have to pay if his policy was dated in 1905. As a result of conference between Sprout, the agent of appellant, and Shearer, the latter, on October 26, 1905, made a written application to surrender his old policy and take out the new twenty payment life, which was to be dated March 27, 1896, to correspond with the date of the old policy. Soon after this the application was accepted and the new policy issued. As a part of the plan by which the old policy was surrendered and the new one issued, Shearer executed his note to the company for $1,826, this amount representing the reserve against the policy, which under the law the company was required to have either in money or in a secured note.

On March 22nd Shearer paid to the company $71.90 in cash and executed his note for $215.70, the remainder of the premium due on March 27, 1910. This note was due on June 27, 1910, and on June 25th Shearer advised the company that he had concluded not to carry the insurance any longer, and did not pay the note. In January, 1911, he brought suit against the company to recover from it $1,222.30, the full amount of the premiums he had paid each year from 1906 to 1910 inclusive, with interest thereon from the date of each payment, and in addition thereto, $750 which he alleged was the value to him of the old policy which he surrendered to the company. His action was based on the ground that the company, by false and fraudulent representations induced him to surrender his old policy and accept in place of it the new one.

To this suit the company made a number of defenses, and upon a trial before a jury a verdict was returned in favor of Shearer for the premiums paid by him in 1906, 1907, 1908, 1909, and 1910, with interest on each from the date of its payment. A reversal is asked

on several grounds but we will only notice two: one, that the request of appellant for a peremptory instruction should have been granted, and the other, that the verdict is flagrantly against the evidence.

The rule is elementary that the terms or conditions of a written contract in the absence of fraud or mutual mistake in its execution, cannot be varied, or contradicted, or added to or subtracted from by prior or contemporaneous, parol agreements or arrangements between the parties to the written memorial: Farmers Bank of Wickliffe v. Wickliffe, 131 Ky. 787; Anthony v. Hudson, 131 Ky. 185; Sayler v. Sayler, 141 Ky. 648; Sackett v. Maggard, 142 Ky. 500.

But the broadest application of this rule does not deny to a party the right to attack, in its entirety, with parol evidence, a contract for fraud or want of consideration. Any written contract, without reference to what form it may be put in, and without regard to the circumstances attending its execution, can be assailed, as a whole with parol evidence for fraud or for want of consideration. If this were not true, a written contract, however fraudulent or destitute of consideration, could be enforced, and the party who signed a written obligation would be helpless to protect or defend himself against its enforcement, although he might be able to show, by the most convincing parol evidence that it was procured by fraud or that there was no consideration for its execution. The exception that we have stated to the general rule rejecting parol evidence, to vary a written contract, is too well settled to need more than the mere citation of authorities. Stone v. Ramsey, 4 T. B. Mon. 236; Triggle v. Oldham, 5 J. J. Marshall, 137; Doyle v. Offutt, 135 Ky. 296; Cummings v. Cass, 52 N. J. L. 77; Page on Contracts, section 1207; Greenleaf on Evidence, section 284; Lavalleur v. Hahn, 152 Ia. 649.

HAYCOCK v. JOHNSTON.

81 Minn. 49. (1900)

BROWN, J. This action is one to recover an amount claimed to be due as and for rent of a dwelling house leased by plaintiff to defendant. The court below directed a verdict for plaintiff, and defendant appeals from an order denying a new trial.

The facts are as follows: On April 6, 1899, plaintiff was, and for some time prior thereto had been, the owner of a certain dwell-

ing house situated upon land owned by him in the city of St. Paul, and on that day leased the same to defendant for the term of five years. Defendant took possession of the property and continued to occupy it until September, 1899, when he vacated the same for the reasons to be presently stated. He failed to pay the rent for the months of July, August, September, October, and November, and this action was brought to recover the same. The tract of land on which the dwelling stands extends a distance of ninety feet on Fairmount avenue, and the dwelling and barn, also included in the lease, stand on the westerly part of the tract. Immediately east of the house a driveway extends from the avenue to the rear of the premises where the barn is located. All that portion of the tract of land east of the driveway was vacant and unoccupied at the time the lease was made. Before the execution of the lease, plaintiff informed defendant that he intended to erect another dwelling upon the unoccupied and vacant portion of the land; and in June following he caused the same to be erected, placing the same within fourteen feet of the one leased to defendant. It is the contention of defendant that plaintiff specially agreed not to construct or erect the new building nearer than twenty-four feet to the old one; that he violated this agreement, erected the building within fourteen feet, and thereby evicted defendant from a part of the leased premises, which violation of said agreement relieved defendant from liability for the payment of rent. He also contends that plaintiff never intended to carry out such agreement, but fraudulently represented that he would do so, and thereby induced defendant to lease the premises. For this alleged fraud, he asks for a cancellation of the lease.

The defendant's whole defense is embodied in this alleged special or collateral agreement as to the erection of the new building. The theory of his counsel that the lease is indefinite and uncertain as to the extent of the tract of land covered and intended to be covered thereby is so clearly erroneous as to require no extended notice. The description of the leased property, as contained in the writing, is as follows:

"The real property situate in the city of St. Paul, county of Ramsey, and state of Minnesota, and described as follows; that is to say: Premises known as No. 771 Fairmount Avenue, together with all the appurtenances thereof. This lease to cover the property that the house and barn stand on only."

This description is unambiguous and perfectly definite and clear. The property leased includes, and was intended by the parties to

include, that portion of the tract of land in question upon which the house and barn stand, and that portion only. And the court below was right in excluding the evidence offered by defendant for the purpose of enlarging and extending the description. It follows from this that defendant's further contention to the effect that he was entitled to twenty-four feet of land on the east of the house, for use in connection therewith, is without foundation. It is not so conditioned in the lease. And, as the written contract cannot be enlarged by parol, his theory of eviction falls.

Neither is there any merit in the claim that the lease was obtained by fraud; that by reason of fraudulent representations on the part of plaintiff at and before the execution of the lease, with respect to the location of the new building, defendant is entitled to a cancellation of the lease. All agreements and promises made and entered into by either party preliminary to and simultaneously with the execution of the lease, and with reference thereto, are conclusively presumed to be embodied and contained in the written contract. In no proper view of the law can we construe the alleged collateral agreement with reference to the location of the new building to be or constituted a part or portion of the written lease. It should have been incorporated in the writing. As it was not, defendant is in no position to say that the contract as orally made included the collateral agreement, and that by reason of plaintiff's violation thereof he has been defrauded.

Order affirmed.

CALIFORNIA TITLE ETC. CO. v. PAULY.

111 Cal. 123. (1896)

VANCLIFF, C. Action to foreclose a mortgage executed by the San Diego Cable Railway Company (a corporation), to the plaintiff, in trust, to secure the payment of a series of bonds executed by the mortgagor.

The plaintiff prevailed in the lower court; and the defendant, Pauly, appeals from the judgment of foreclosure, and from an order denying his motion for a new trial.

The appellant contends that the court erred in finding that a certain piece of land, known as the "Pavilion Grounds," was embraced

in the description of the mortgaged property, and in ordering a sale of those "grounds" as a part of the property mortgaged; and this is the principal point in controversy on this appeal.

Appellant contends that "the only ground on which the court holds the 'Pavilion Grounds' to be included in the mortgage is that said grounds are an appurtenance of the line of railway," and insists that whether or not those grounds are appurtenant to the railway is the only material question involved; and then proceeds to controvert the proposition that they are so, on the ground that land cannot be appurtenant to land, etc.

Counsel for appellant say: "The court erred in admitting parol evidence showing the general course and termini of the cable road, the location of the 'Pavilion Grounds,' and the amount of travel induced by reason of the pleasure resort maintained thereon."

In this connection it was proved by undisputed parol evidence that the purchase of the Pavilion Grounds was contemplated by the railway company before and at the time the mortgage was executed; that one of the termini of the road was within those grounds; that the sole object of the purchase was to increase travel upon the road; that the grounds were used in connection with the road for that purpose only; that they were adapted to such use and did increase the traffic on the road about one hundred per cent; that the grounds were improved at the expense of the railway company, and were opened to the public as a pleasure resort at the same time the road was finished and opened for travel, no distinct charge being made for admission of the public to those grounds; that the railway company furnished music, a dance hall, and other conveniences for visitors and picnic parties on Sundays and holidays at an expense of two hundred or three hundred dollars per month; and that the grounds thus used by the railway company were worth three to four times as much as they would be for any other purpose.

The purpose for which such evidence was introduced, and which it served, was to prove that the Pavilion Grounds were acquired by the railway company for use and adapted to use "on or about its said lines of railway", and thus to identify them as being after-acquired real estate described in the mortgage; or, as may be otherwise expressed, to apply to those grounds the description contained in the mortgage, though the description, of itself, is unambiguous and sufficiently certain. That parol evidence is competent for this purpose does not admit of doubt. Greenleaf on Ev. ¶ 287; Hancock v. Watson, 18 Cal. 137;

Began v. O'Reilly, 32 Cal. 11; Marriner v. Denison, 78 Cal. 202; Towle v. Carmelo, 99 Cal. 397.

For the reasons given in the foregoing opinion the judgment and order are

Affirmed.

GATES et al. v. BENNETT.

33 Ark. 475. (1878)

ENGLISH, C. J. On the 12th day of March, 1875, John Bennett brought an action of replevin before Justice Booth of Mattensas township, Prairie county against David Gates.

Upon affidavit and bond, a writ of replevin was issued, the constable seized the property sued for, and upon the execution of a cross-bond by defendant, he was permitted to retain possession of it.

It was competent for appellants to prove, by parol evidence, that a complaint and affidavit were filed in the replevin suit, a writ issued, bond executed, and the return upon the writ, and that they were all in regular form, and had been lost or destroyed. Davis v. Pitt, 1 Ark. 359. Mason, adm'r v. Bull, 26 Ark. 167. But it was not competent for appellants to prove by the attorney who brought the replevin suit, or by the justice who rendered the judgment, or by any witness, that the justice in fact rendered any other or different judgment than that shown to have been rendered by the transcript offered in evidence. Or that the justice by mistake, entered the judgment in the names and in favor of Gates Bros., when it should have been entered in favor of David Gates, as trustee, etc. Butler v. Owen, 7 Ark. 373. Barkman v. Hopkins, 6 ib. 157. State Bank v. Minikin, 12 ib. 719. Kimball v. Merrick, 20 ib. 12, and cases cited.

If the justice in fact made a mistake in entering the judgment—if he entered it in the names and in favor of Gates Bros., when it should have been entered in favor of David Gates, as trustee, etc., the parties relying on the judgment as a former recovery, should have taken the proper steps to have the judgment amended, and offered in evidence a transcript of the amended judgment.

Reversed.

RICHARDSON v. SKETCHLEY.

150 Iowa 393. (1911)

This is an action to quiet title to a small tract of land. There was a decree for the plaintiff, and the defendant appeals.—Affirmed.

EVANS, J. It is urged by appellant that the deed under which plaintiff claims is absolutely void for uncertainty, and that plaintiff and his grantors took nothing under it. This position is not quite sound. The deed standing alone would be quite ineffective for the purpose of specific performance; but is by no means wholly void. It indicates on its face that Peter Dyon did undertake for a specific consideration to convey by warranty deed to Mrs. Richardson a particular tract of land conforming to the description contained in the deed. The description may be aided by extrinsic proof not inconsistent with the description contained in the deed itself.

Affirmed.

ALLEN & TRAMMELL v. TURNHAM.

83 Ala. 383. (1887)

This action was brought by Allen & Trammell, suing as partners, against Joseph C. Turnham; and was founded on the defendant's promissory note for $500, which was dated the 6th December, 1873, and payable twelve months after date, to J. N. Brisby, by whom it was indorsed and transferred to plaintiffs. Indorsed on this note were the following credits: December 2nd, 1874, $250; December 24th, 1878, $169.31; and January 25th, 1882, $42.13. The defendant pleaded usury, and a special plea stating the facts which constituted the alleged usury; and he was allowed by the court to testify, against the objection of the plaintiffs, that it was verbally agreed between him and Brisby, at the time the note was given, that, on payment of one-half the amount at maturity, the balance should be extended one year at twelve per cent interest per annum; that this agreement was afterwards reduced to writing, as stipulated at the time and $250 was paid on the note at maturity as shown by the indorsed credit. The written agreement, which was dated May 4th, 1874, and signed by both of the parties, was in these words: "This will certify, to whom it may

concern, that whereas Joseph C. Turnham has bought a tract of land from me, J. N. Brisby, for which he gave his note for $500, payable on the 25th December, 1874, but it is now agreed and understood between the parties, that in case the said Turnham shall fail to pay the last half of the note, $250, by the said 25th December, 1874, the said Brisby agreed to wait with him for twelve months longer, the said Turnham promising to pay him twelve and a half per cent. per annum." The court admitted this agreement as evidence against the objection and exception of the plaintiffs; and instructed the jury, in effect, that, on these facts, the transaction was usurious, and the plaintiffs were entitled to recover the balance due on the note, if any without interest. The plaintiffs excepted to each of these rulings, and here assign them as error.

SOMERVILLE, J. It is not contended there is any usury in the note sued on which was executed December sixth, 1873, payable to J. N. Brisby, twelve months after date, in the sum of five hundred dollars, and was transferred by Brisby to the plaintiffs. This contract does not, covertly or otherwise stipulate for a higher rate of interest than that allowed by law. It is sought, however, to import into the original agreement the taint of usury, by showing that, contemporaneously with the execution of the note, an oral agreement was entered into, that, upon the maturity of the note, the maker might pay half of the amount, and extend the other half by agreeing to pay usurious interest, at the rate of twelve and a half per cent per annum; and that this latter agreement was subsequently reduced to writing, on May 4, 1874, and at the maturity of the original note, in December following, half of the sum was paid as stipulated.

The admission of this parol evidence, we think, was error. It violated the rule, that parol, or extrinsic contemporaneous evidence is inadmissible to contradict or vary the legal effect of a valid written instrument. It must be presumed that the parties to this written instrument intended thereby to fully express their intention and agreement: and they are presumed to have abandoned all oral suggestions, or verbal agreements, antecedent to, or contemporaneous with the writing, having reference to the subject-matter of the contract. The writing itself must be deemed conclusive as to the matters embraced in it. The note was an agreement to pay eight per cent interest per annum, which was not usurious, but lawful. The evidence introduced showed a contemporaneous oral agreement to pay twelve and a half per cent per annum which was usurious, and therefore unlawful. This if allowable would operate to change the legal effect of the original note, so as to make it voidable for the interest from the beginning.

This evidence does not come within the rule, that parol evidence is always admissible to show the illegality of the consideration, or subject-matter of a written agreement. If the original note, here sued on, had been usurious, it matters not by what words of device, or acts of artifice or evasion, it was sought to be concealed under false recitals in the writing, this fact could be proved by oral evidence. But the substitution of an oral usurious contract in the place of a written one not usurious, is not permissible, when the one is contemporaneous with the other, as in this case.

This evidence being excluded, the case is completely analogous to Van Biel v. Fordney, 77 Ala. 76, where it was decided that, when the original transaction is not usurious, a subsequent agreement to pay illegal interest, in consideration of forbearance, will not impart to the former the taint of usury so long as the first contract remains in force, without renewal, discharge, or cancellation, the subsequent contract alone is affected by the usury, and the payments of illegal interest will be regarded merely as partial payments on the original debt.

The usurious agreement of May 4th, 1874, which was reduced to writing by Turnham and Brisby, does not renew, discharge or cancel the original note, but is entirely collateral to it, leaving it in full force and effect. The suit on the original agreement is such an abandonment of the subsequent one as to expurgate the taint of usury, which might otherwise be made to inhere to the transaction. Masterson v. Grubbs, 70 Ala. 406.

These principles will settle the case upon all points likely to be considered on another trial, the note sued on not being usurious under the facts set out in the bill of exceptions. This is all we need to decide.

Reversed and remanded.

BURNS & SMITH LUMBER CO. v. DOYLE.

71 Conn. 742. (1898-99)

Action by the payee against the acceptor of a bill of exchange to recover the amount thereof. Curtis, J. Facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court.

The following is a copy of the bill of exchange counted upon in the complaint:

"Bridgeport, Conn., June 24, 1893.

"Mr. Thomas Doyle:

"Please pay to The Burns & Smith Lumber Co., or order, the sum of four hundred twenty ($420.00) and no/100 dollars, value received, and charge the same to my account.

"E. P. Mills.

"Accepted, June 24, 1893. Thos. A. Doyle."

The answer as finally amended consisted of two defenses, as follows:

"First Defense. 1. The defendant accepted the bill of exchange at the solicitation of the plaintiff, upon the express condition that only upon the defendant's becoming indebted for services to the drawer of said bill should the defendant be called upon to pay or be made liable upon said bill of exchange. 2. The defendant says he is not liable upon said bill, because the drawer of the same never performed any service for the defendant, nor did the defendant become indebted to said drawer after said acceptance of said bill.

"Second Defense. 1. The defendant says that at the time of the said acceptance of said bill he did not owe the drawer of said bill, or the plaintiff, or either of them, upon any demand whatever, and that said acceptance was known to the defendant and to said plaintiff to be wholly without consideration, and that said plaintiff is not a bona fide holder for value of said bill of exchange. 2. The matters contained in the first defense are made part of this defense."

The reply was a general denial.

The plaintiff objected to the introduction of any parol evidence to prove the allegations of the defenses, or either of them, and to all evidence tending to prove the foregoing facts, except the fact of acceptance. The court overruled the objection and admitted the evidence.

The plaintiff also claimed that upon the facts found judgment should be rendered in its favor, and the court overruled this claim. The reasons of appeal are based upon these adverse rulings.

TORRANCE, J. The acceptance sued upon is in writing, and is an absolute and unqualified one, as distinguished from a conditional one. It is well settled that in an action at law such an acceptance cannot be cut down to a conditional one, even by the clearest proof of a contemporaneous oral agreement to that effect. Such an agreement, however conclusively proved, would not avail the defendant for such a purpose, and therefore all evidence of it is excluded. Osborne v. Taylor, 58 Conn. 439; Averill v. Sawyer, 62 id. 560; Caulfield v. Hermann, 64 id. 325; Hills v. Farmington, 70 id. 450, 453.

But if the written acceptance was delivered to the plaintiff upon an oral condition assented to by the plaintiff, that it was not to become operative, or have any existence at all as an acceptance, until the cottage was completed and the money became due to Mills, that condition, if proved, would avail the defendant, and under proper pleadings evidence of such a conditional delivery would be admissible. McFarland v. Sikes, 54 Conn. 250; Trumbull v. O'Hara, 71 id. 172; Michels v. Olmstead, 157 U. S. 198; Bedell v. Wilder, 65 Vt. 406; Pym v. Campbell, 6 El. & Bl. 370; Pattle v. Hornibrook, L. R. (1897) 1 Ch. Div. 25.

The general rule applied in the former class of cases is, that a prior or contemporaneous oral agreement intended to add to or cut down or vary a written agreement is without legal effect. It is founded on the principle that the writing expresses the final views of the parties to the exclusion of all extrinsic, prior or contemporaneous agreements or understandings. It is a salutary rule and should be strictly adhered to.

The rule applied in the latter class of cases is, that you may show that a writing purporting to be a contract never came into existence as a contract, or has ceased to be a contract, and may show this, of course, by evidence outside of the writing. This latter rule is not an exception to the former nor an infringement of it.

The practical distinction between the two rules was tersely stated by Erle, J., Pym v. Campbell, *supra*, as follows:

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." Where a defense of this kind is set up in a case in which the written contract has been actually delivered to the other party, as in this case, the proof of conditional delivery ought to be clear and strong. In such case possession of the contract by the other party is *prima facie* evidence of an unconditional delivery. McFarland v. Sikes, 54 Conn. 250, 251.

In the court below the defendant claimed that the acceptance sued upon came within the latter class of cases, and he therefore claimed the right to show, not a conditional acceptance, but a conditional delivery of an acceptance; a delivery under the terms of which the writing signed by the defendant never became a contract at all. The defendant claimed the right to prove such a delivery under the pleadings.

The plaintiff claimed that evidence of such a delivery was not admissible under the pleadings, and the court overruled this claim, and against the plaintiff's objection admitted the evidence; and one of the questions upon this appeal is whether the court erred in so doing.

Leaving out of view for the present the defense of want of consideration, we think the answer sets up a conditional oral acceptance, and not a conditional delivery of an acceptance. It alleges, in effect that the absolute written acceptance was made, but was made upon an oral condition that the defendant should not be called upon to pay it, or be made liable upon it, except in a certain stated contingency. This is nothing more or less than an allegation of the existence of a contemporaneous oral agreement that the absolute, written acceptance should be treated as a conditional one. The defense in question contains no hint that the acceptance was delivered conditionally, within the meaning of the cases upon which the defendant relies. It is analogous to the defenses set up in Osborne v. Taylor, *supra*, and in Beard v. Boylan, 59 Conn. 181, which were held to be demurrable, because they each set up a contemporaneous oral agreement to effect a written contract. On the same ground we think the defense in question could not have stood the test of a demurrer. Under this defense, then, the defendant was not entitled to prove such a conditional delivery as he claimed, because that fact, if it existed, was not within the issue, and evidence of it should have been excluded.

Furthermore, in this view of the matter, if the facts found are to be regarded as establishing a conditional delivery of the acceptance, the finding goes entirely outside of the issue, and such a finding furnishes no support for a judgment based upon facts so found. Atwood v. Welton, 57 Conn. 514; Ives v. Goshen, 63 id. 79.

The plaintiff further claims that even if the facts found were provable under the pleadings, yet the finding does not show a conditional delivery of the acceptance, as distinguished from a conditional acceptance. Upon this point the finding is not free from doubt, but we think the fair import of it is that the acceptance was delivered upon a condition that it was not to take effect at all as an acceptance except upon a stated contingency. That was the ground upon which the judgment was based, and apparently the sole ground; and taking the record as a whole we think the finding is that the delivery was conditional.

As there must be new trial for reasons already given, we deem it unnecessary to consider or decide the questions raised by the defense of want of consideration for the acceptance.

There is error and a new trial is granted.

In this opinion the other judges concurred.

GREASON v. ST. L., I. M. & S. RY.

112 Mo. App. 116. (1905)

The petition alleged and the evidence proved, that the defendant, instead of keeping its agreement to carry the ties to East St. Louis for ten cents a hundredweight, charged and collected a higher rate, to-wit: thirteen and one-quarter to fifteen cents a hundredweight, which higher rate the plaintiffs were compelled to pay; that afterwards plaintiffs demanded the excess of freight charged ($250) which defendant refused to pay; wherefore judgment was prayed for said sum. The answer was a general denial. The articles actually shipped were hewn switch ties. The defendant company charged the plaintiffs more than ten cents per hundredweight for transporting the ties from the points of shipment to East St. Louis. The essential dispute is as to whether the letter from defendant's freight agent, quoting a rate for hauling lumber, constituted an agreement on the part of the defendant to carry hewn switch ties at ten cents a hundredweight—that is, whether hewn ties are lumber within the meaning of the defendant's agreement to transport lumber for ten cents a hundredweight. To maintain their position that switch ties are lumber the plaintiffs, over the defendant's objection, introduced the definition of the word "lumber" given in the Universal Dictionary, to-wit: "Lumber (Noun)—Marketable timber. Lumber (Verb)—To cut forest timber and prepare it for market." An exception was saved to the admission of that evidence.

The jury returned a verdict for plaintiffs for $19.46 and the railroad company appealed.

GOODE, J. (after stating the facts).—It will be observed from the foregoing statement that the plaintiffs declared on a supposed agreement by the defendant contained in the letter dated January 20, 1902, to transport switch ties from Harviell and Poplar Bluff to East St. Louis, for ten cents a hundredweight. It is alleged that, relying on said agreement, plaintiffs shipped nineteen carloads of ties and were charged an excess above the rate mentioned, in violation of the agreement. The letter quoted a rate on lumber, not on ties.

The solution of this case depends, therefore, on what the defendant meant by the word "lumber" or rightly as understood by plaintiffs to mean. The meaning of the word is vague and indefinite and it has different senses according to the context in which it is used in documents, or the nature of the transactions to which the parties refer.

No decision has been cited that "lumber" means hewn ties. If the

word lumber has any peculiar meaning among dealers in it or in transportation circles, which would embrace or exclude hewn ties, no evidence of the fact was offered. The meaning to be applied to the word in the letter in question is its ordinary meaning in vernacular speech, unless the previous dealings between the plaintiffs and the defendant, or the circumstances under which the letter was written, or the light thrown on the intention of the letter by the other facts in evidence, the tariff sheet and the testimony of the freight agent, compel a different significance. All this evidence was introduced by the plaintiffs and they are in no position, therefore, to deny its truthfulness. We emphasize the fact that this is an action on a specific written agreement and is to be determined exclusively by ascertaining what that agreement was. Laclede, etc., Co. v. Iron Works, 169 Mo. 137, 69 S. W. 384.

All the evidence tending to explain what the defendant meant when it said "lumber", either in the letter declared on or other documents, goes to show it did not mean hewn switch ties.

The rule of law that extrinsic evidence may be received to identify the subject-matter of an ambiguous contract, has no application here, because the agreement in defendant's letter had no particular subject-matter. That rule is employed to ascertain what property was intended by an agreement in reference to some particular property too loosely described to be identified from the description alone.

Thus if a contract of sale describes the thing sold indefinitely, it may, within limits, be helped out by extrinsic evidence. Macdonald v. Longbottom, 1 E. & E. 597; M'Adie v. Sills, 24 U. S. C. 606; 2 Taylor, Evidence (6 Ed.), sec. 1080. We conceive it to be the duty of a court to say what is meant by a word in an instrument, used as far as appears, in its ordinary, instead of a technical or trade sense, or a peculiar one adopted by the parties.

As "lumber" is a word of vague meaning, testimony to show the sense in which these parties used it was competent; but there was none introduced to show it was employed in an unusual sense and therefore, its usual one must be accepted in interpreting their agreement. Williams v. Lumber Co., 72 Wis. 487; Dutch v. Anderson, 75 Ind. 40. The words of a contract are to be understood in their popular and accepted sense unless something indicates that a different meaning was attached to them by the persons concerned. Lovelace v. Assn., 126 Mo. 104. 28 S. W. 877. And it is the duty of a court to interpret writings free from ambiguity. Mathews v. Danahy, 26 Mo. App. 660.

The essence of this case is not whether ties ought to have been

carried at lumber rates according to the tariff sheets (and the tariff sheets in fact stated to the contrary), but whether defendant when it gave a rate for lumber, meant to give and was understood to give a rate for hewn switch ties. Curtain poles and wagon spokes are put in the tariff sheets among other things carried at the lumber rate. But who would say they are lumber or that an agreement to carry lumber was an agreement to carry them? Neither the letter itself, nor the extrinsic evidence before us supports the plaintiffs' case.

The judgment is, therefore, reversed.

All concur.

SAMUEL H. CHUTE CO. v. LATTA.

123 Minn. 69. (1913)

HALLAM, J.

1. Plaintiff leased certain premises to one Dahlquist. Later, by a written agreement in which plaintiff, defendant and Dahlquist joined. Dahlquist assigned the lease to defendant, defendant assumed all obligations of the lessee hereunder, and plaintiff consented to the assignment. This action is brought to recover two instalments of rent due upon the lease so assigned. The defense is that there was a concurrent verbal agreement that the written contract should be no longer operative, in the event defendant should form a corporation known as the Cozy Photo Play Company, and should assign the lease to such corporation when formed. It is claimed that this corporation was organized and the assignment made. The one question in the case is: Was it competent for defendant to prove the verbal agreement that the written contract should not be enforced in the contingency mentioned? We hold that it was not.

2. These parties reduced their agreement to writing. "All the authorities are substantially agreed that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto." Wheaton Roller-Mill Co. v. John T. Noye Mnfg. Co., 66 Minn. 156, 159, 68 N. W. 854, 855.

3. It is contended that the written agreement in this case embodied

only part of the agreement of the parties, and that it was executed to partially carry out a prior verbal agreement.

It is true that, where a part only of the agreement between the parties is reduced to writing, it is competent to prove by parol the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms. Phoenix Pub. Co. v. Riverside Clothing Co., 54 Minn. 205, 206, 55 N. W. 912. But this agreement was not incomplete. The criterion of completeness or incompleteness of the writing is the writing itself. We do not mean that the court is limited to a mere inspection of the document. As in other cases of doubtful construction, the court is at liberty to view the circumstances under which, and the purpose for which, the writing was executed. Where the writing, construed in the light of such circumstances, shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be permitted to introduce a term which does not appear there. Wheaton Roller-Mill Co. v. John T. Noye Mnfg. Co., 66 Minn. 156, 160, 68 N. W. 854; Potter v. Easton, 82 Minn. 247, 250, 84 N. W. 1011.

Tested by this rule it cannot be held that the written contract is incomplete. By its terms it makes the obligation to pay absolute. There are no surrounding circumstances that place the contract in any different light. The proof of surrounding circumstances that defendant introduced was simply proof that the contract made was different from the terms written instrument. Such evidence is not permissible. To allow a party to lay the foundation for such parol evidence by oral testimony that only part of the agreement was reduced to writing, and then prove by parol the part omitted, would be to work in a circle and to permit the very evil which the rule was designed to prevent. Thompson v. Libby, 34 Minn. 374, 377, 26 N. W. 1; Wheaton Roller-Mill Co. v. John T. Noye Mnfg. Co., 66 Minn. 156, 68 N. W. 854; 17 Cyc. 716, 717.

4. It is contended that the alleged parol stipulation was a contract collateral to the written agreement sued on, and that on that ground it was proper to prove it.

It is true that proof is admissible of any collateral parol agreement, or of any independent fact, which is not inconsistent with, or does not qualify, any of the terms of the written contract, even though it may

relate to the same subject-matter. Backus v. Sternberg, 59 Minn. 403, 61 N. W. 335; H. H. King & Co. v. Dahl, 82 Minn. 240, 84 N. W. 737. But the alleged oral stipulation, which defendant attempted to prove in this case, was in no sense collateral to or independent of the main contract. The alleged oral stipulation provided that the obligation shall be conditional, and provided for nothing else. The particular element of the alleged intrinsic evidence is accordingly dealt with in the writing. Defendant simply attempted to prove that it was verbally stipulated as an integral part of the negotiation that the obligation, which by the terms of the writing was absolute, should in fact be conditional. This he cannot do.

5. It is further contended that it was proper for defendant to prove a contemporaneous verbal agreement that he should be relieved from his written contract on the occurrence of a future contingent event, or upon compliance with a future condition.

It is true that, in case of a simple contract in writing, it is competent to show by parol that, notwithstanding its delivery, the parties intended that it should be operative as a contract only upon the happening of a future contingent event, or the performance of a condition, such as that it should first be executd by some other person. Merchants' Exchange Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255; Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 456; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057. Such evidence tends to prove a condition precedent to the attachment of any obligation under the written instrument. This is not to vary a written instrument, but to prove that no contract was ever made—That its obligation never commenced. Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995. But the verbal stipulation alleged in this case was not a condition precedent. The obligation of defendant unquestionably took effect as a complete contract.

Order affirmed.

RAILWAY CO. v. TRUSKETT.

67 Kan. 26. (1903)

The opinion of the court was delivered by

SMITH, J. At the time the written agreement was made on which this action was based, defendants in error, as promoters and stockholders of the Kansas, Oklahoma Central & Southwestern Railway Company, had laid out a right of way from Caney, in Montgomery county, Kansas, to Bartlesville, in the Cherokee nation, and a line from the latter town to Collinsville, a distance of about thirty-five miles, and had done some grading along the route. They were prosecuting the work under the rights of way granted by acts of congress referred to in the statement. The amended petition of plaintiffs below contains this allegation with reference to the contract between the parties:

"That it is not definitely stated in said writing how many miles of said railway were to be constructed by defendant, nor when; whereas, it was in fact understood and agreed that thirty-five (35) miles should be built, and completed, within twelve months of the time when 85 per cent. of said capital stock of said corporations had been delivered to defendant by plaintiffs, and other things done as in said writing enumerated, and that the balance of said railway, and the branches thereof mentioned in said last-named act of congress, should be built and constructed within the time fixed for the completion thereof in said act of congress."

To remove the alleged indefinite terms in the contract, oral testimony was admitted by the trial court, confined mainly to conversation between the officers of the Atchison company and the plaintiffs below, at and before the time the writing was signed, wherein the former stated, in effect, that all concessions and donations received on lines of road built under the authority of the acts of congress mentioned, beyond the stipulated thirty-five miles, should go to the plaintiffs.

It was the contention of plaintiffs below that the line which the Atchison company aided in building from Guthrie to Pawnee, a distance of 100 miles, known as "The Eastern Oklahoma railway," and for the building of which concessions were received, was constructed along a route provided for in the acts of congress granting the right of way to the Kansas, Oklahoma Central & Southwestern Railway Company, of which they were stockholders, and, therefore, under the terms of the contract of sale sued on, after its meaning was made certain, that plaintiffs below were entitled to such concessions, aids,

and donations. The exact language employed by the parties in the written contract was this:

"The Atchison company agrees that within twelve months of the transfer and delivery to it of not less than eighty-five per cent. of the capital stock of the Oklahoma companies, and transfer to it or payment and satisfaction of all outstanding indebtedness and other obligations of the Oklahoma companies, and any liens or encumbrances upon their property, it will complete or build, or cause to be built, at least thirty-five (35) miles of its railroad, from the junction near Bartlesville, Indian Territory, towards Collinsville, Indian Territory, and cause the Oklahoma companies, and each of them, to assign and transfer to the stockholders, the parties of the first part herein, all right, title and interest of said companies, and each of them, in or to any aids, concessions or donations obtained along the lines of railroad of said companies as constructed and described in said railway-extension bill."

It is not alleged that the words of the instrument are susceptible of two different constructions, or are not intelligible, the charge being that "it is not definitely stated in said written contract how many miles of said railway were to be constructed by said defendant, nor when." We do not think the language of the contract is subject to the criticism made of it with respect to the maximum number of miles of road to be built. It was for an increase of this expressed maximum that plaintiffs below called extraneous testimony to their aid.

The words used convey to our minds a definite and clearly expressed refusal of the Atchison company to bind itself to build, or cause to be built, more than thirty-five miles of railroad along the route described in the railway-extension bill. The thirty-five miles of road which the Atchison company agreed with the stockholders should be constructed was built along the line described in the railway-extension bills in compliance with the contract. The complaint of the plaintiffs below was that the Atchison company built 135 miles of road under the same grants from congress, and that the aids and donations received along the last 100 miles belonged to them.

There is no claim that plaintiffs did not get the aids and donations along the thirty-five miles from the Kansas state line south, but the action was brought to recover the value of the concession received on the line of road from Guthrie northeast to Pawnee, a distance of about 100 miles, alleged to have been built by the Atchison company under the name of the Eastern Oklahoma Railway Company.

Conceding that the road from Guthrie to Pawnee was constructed and owned by the Atchison company, and that all donations and aids

went to it, yet, in order to recover for a breach of the contract, Truskett and his associates must show that by its provisions such aids and donations belonged to them. They cannot do this by enlarging the terms of a written instrument which is not ambiguous or of doubtful meaning, resorting to parol testimony to that end. The mere assertion by a party to a written contract that uncertainties and ambiguities exist in it will serve no purpose when, by a perusal of the writings, the court can find no equivocal language employed.

Again, the writing is sought to be reformed by parol testimony in respect to the time of performance of those things which it is alleged that the Atchison company agreed to do as shown *aliunde* the contract. It is averred that the limitation of twelve months in which it stipulated to build the road a distance of not less than thirty-five miles should be extended beyond that time as to the number of miles it built between Guthrie and Pawnee to a time limited only by the date for completion, fixed in the last act of congress. This would be a violent wresting of obvious language out of the written agreement, and substituting therefor words which the parties themselves were careful not to use. The rule of law applicable to the case is old and familiar. It was well stated in Naumberg v. Young, 44 N. J. L. 331, 339, 43 Am. Rep. 380, as follows:

"The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement is the contract itself. When parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected. 2 Tayl. Ev. Sec. 1035."

See, also, Thisler v. Mackey, 65 Kan. 464, 70 Pac. 334; Ehrsam v. Brown, 64 id. 466, 67 Pac. 867; Getto v. Binkert, 55 id. 617, 40 Pac. 925; Assurance Co. v. Norwood, 57 id. 610, 47 Pac. 529; Milich v. Armour, 60 id. 229, 56 Pac. 15; Trice v. Yoeman, 60 id. 742, 57 Pac. 955; Wilson v. Jones, 48 id. 767, 30 Pac. 117; Drake v. Dodsworth, 4 id. 150; Trustees of Southampton v. Jessup, 173 N. Y. 84, 65 N. E. 949; United Press v. New York Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288; Tracey v. The Union Iron Works, 104 Mo. 193, 15 S. W. 203. In the last case cited (p. 199) it was said:

"We may, however, properly remark that the adoption of the modern

practice, admitting as witnesses the parties directly interested in the action, seems to add a cogent reason to those existing at the common law for a close adherence to the rule under discussion. If the uncertainty of 'slippery memory' furnished a ground for excluding such verbal testimony in the days of Lord Coke (Countess of Rutland v. Earl of Rutland (1604), Coke's Reports, part 5, 26a), how much stronger reason for such exclusion today, when the influence of self-interest is so likely to render the memory of litigating parties more 'slippery' than was that of the witnesses of olden time."

The judgment will be reversed, with directions to the court below to sustain the demurrer to the evidence.

All the Justices concurring.

THOMAS J. JENKINS v. SPRINGFIELD REDUCTION AND CHEMICAL CO., and JOHN C. DYSART.

168 Mo. App. 534. (1913)

STURGIS, J. The plaintiff recovered judgment against the defendants for the conversion of a quantity of fertilizer claimed to be his property. The defendants justified the conversion by asserting their own ownership to the same.

The dispute in this case grew out of the question whether or not the product in dispute, designated as fertilizer in the petition, passed under this contract to the defendant corporation and became its property or whether it remained the property of the plaintiff.

The evidence shows that at the time this contract was entered into there was at the plant a considerable amount of the finished product in sack and all parties agree that this is fertilizer and not "tankage" and remained the property of the plaintiff. There was also considerable amount of the raw material or semi-raw material, which all parties agree passed to the defendant under the name of "tankage". There was also in bins or sheds a considerable amount of the product testified to by one witness as "ground tankage" but which had all the ingredients of the finished product and differed in no way from the fertilizer in the sacks. All that needed to be done to put this product on the market was to put it in sacks. This is the product that is in dispute and is claimed by the defendants to have passed to the corporation as "tankage" or otherwise under the contract mentioned and become its

property. There is no question but that if this product was the property of plaintiff, then the defendants converted it to its own use.

The greatest difficulty in this case arises from the fact neither party seems to have tried it on any definite theory. In the defendants' brief in this court, it is said: "The vital issue of fact in this case was or ought to have been, whether the word tankage in the said contract was used in its ordinary sense, or in its purported trade or technical sense." If the word has an ordinary and common meaning, then it would not be necessary or proper to introduce extrinsic evidence to show what that meaning is.

The product now in dispute is the mixed and complete product and is quite different from the refuse of the tanks before mixed with other ingredients. Under this view of the case the judgment must be affirmed.

The writer of this opinion thinks that it is but just and fair to the parties litigant, and in order that this opinion may not be misunderstood, to say that had the defendants tried the case throughout on the theory that the word "tankage" is necessarily used in this contract as a technical term that demands an explanation by extrinsic evidence; that the parties themselves agreed and understood at the time and that plaintiff pointed out and designated this loose product in the bins as being "tankage" and being sold under that name; and that defendants bought this product under the name of tankage; then it would have been proper to have admitted evidence to this effect and to have left it to the jury under proper instructions to determine whether this particular product was or was not included within that term as used in the contract.

This case falls within the class where in an ordinary transaction an ambiguous term is used and the parties are permitted to introduce extraneous evidence and circumstances to show its meaning. In regard to such cases it is said in 1 Ency. of Evidence 837, 838: "So, if the previous negotiation make it manifest in what sense the parties understood and used the ambiguous term in the writing, they may be resorted to, and indeed, they furnish the best definition to be applied in ascertaining the intention of the parties. Within the rule of admitting evidence of surrounding facts and circumstances to aid or explain an ambiguity, it has been held proper to receive evidence or declarations of the parties tending to show what they understood the ambiguous term or expression to mean." And on page 841, it is further said, "Such evidence neither varies nor adds to the writing but merely translates it from the language of the trade or art in question, into the ordinary

language of people generally." (Gaunt v. Pries & Co., 21 Mo. App. 540.)

The judgment will be affirmed.

HARMAN v. FISHER.

90 Neb. 688. (1912)

ROOT, J. This is an action in equity to settle conflicting claims to a quarter section of land in Furnas county. The case is here on appeal and cross-appeals.

A majority of the court instructed me to say that oral evidence is admissible to prove the actual consideration for a deed, even though the effect may be to convert the instrument from one of bargain and sale into one of pure gift; such proof has always been considered competent in other actions, and a majority of the court does not think sound sense should permit an exception to be made in a case where, to do so, is to compel the court to hold contrary to the fact, and thereby render ineffectual a plain provision of the statute. Such evidence, although admissible, should not be held to prove the fact, unless it is clear and convincing and leaves no reasonable doubt in the mind concerning the consideration given for the deed.

The courts of last resort are not in harmony in cases like the one at bar. The following cases directly sustain the majority of this court: Bradley v. Love, 60 Tex. 472; Rockhill v. Spraggs, 9 Ind. 30; Jones v. Jones, 12 Ind. 389; Kenney v. Philipy, 91 Ind. 511. See, also, Sires v. Sires, 43 S. Car. 266, and Salmon v. Wilson, 41 Cal. 595.

The writer of this opinion, while recording the views of a majority of the court, personally holds to the contrary. That is to say, that while for many purposes recitations in a deed may not, even as between the parties and their privies, be conclusive evidence of the facts, and the recitation of consideration is frequently held to be solely *prima facie* evidence of the fact, yet it seems to me that, both upon reason and the better authority, persons claiming under a deed should not, in the absence of fraud, or mutual mistake, be permitted to prove by oral evidence that a recitation of a substantial, valuable consideration, where no other consideration is referred to in the deed, is false, and prove by oral evidence that the sole consideration was good so as

to change the quality of the estate thereby conveyed. In such cases the recitation gives quality to the estate transferred, and, to contradict it by oral evidence, violates the statute of frauds and perjuries. Patterson v. Lamson, 45 Ohio St. 77; Brown v. Whaley, 58 Ohio St. 654; Groves v. Groves, 65 Ohio St. 442.

Among the cases cited to sustain the majority of the court Bradley v. Love, *supra,* is directly in point, but the opinion is a mere declaration that the law is as stated and contains no convincing argument to sustain the conclusion. The later Indiana cases follow Rockhill v. Spraggs, 9 Ind. 30, and it was decided on the authority of M'Crea v. Purmort, 16 Wend. (N. Y.) 460. The New York case, however, merely involved the right of a party to a deed to prove that the consideration therefor was a quantity of iron delivered by the grantee to the grantor, rather than a money consideration, as recited in the deed. That case was correctly determined, but does not sustain the Indiana cases, nor the majority opinion in the instant case.

In Salmon v. Wilson, 41 Cal. 595, in addition to a recitation of a nominal valuable consideration, there was a recitation of a good consideration, and it was held that, upon a consideration of the entire instrument, the court should construe the deed to be one of gift.

In Carty v. Connolly, 91 Cal. 15, that court recognize the rule that, in the absence of fraud, oral evidence should not be received to contradict the recitation of consideration for the purpose of defeating the conveyance according to its terms. In the case at bar the testimony is convincing that the sole consideration for the deed was that of love and affection, and we conclude, upon a consideration of the entire record, that substantial justice has been done.

The judgment of the district court, therefore, is

Affirmed

MARTIN v. MASK.

158 N. C. 436. (1912)

This action was commenced by Martin & Garrett, agents, before a justice of the peace, to recover the sum of $166.65, and interest on $166.65 from 14 December, 1910, due by five notes for $33.33 each, given for rent of house No. 307 Third Street, Augusta, Ga., said notes

being due 1 March, 1911; 1 April, 1911; 1 May, 1911; 1 June 1911; and 1 July, 1911.

The defendant denied any liability to the plaintiffs.

Judgment was rendered by the justice in favor of the defendant, and the plaintiff appealed.

In the Superior Court the defendant moved to dismiss the action on the ground that it appeared upon the face of the summons and also from the notes that the plaintiffs were agents, and that the action should have been brought in the name of their principal, the real party in interest.

The motion was denied, and the defendant excepted. The defendant offered to prove that he was, at the time of making said contract, the agent of the Metropolitan Life Insurance Company, and he did not know how long he would reside in the city of Augusta, his residence there being entirely dependent upon his employment by the company at that point; and in consequence thereof there was a separate and distinct contract made with the plaintiffs at the time of the signing of the said notes, by which it was agreed and understood that the defendant would pay said notes which were given for the house in which he was to reside and did reside during his stay in Augusta, but that if he was required to leave the city of Augusta, that he was to pay no other note, and that he would surrender the possession of the house to the plaintiffs. That, in accordance with the contract, the defendant did pay to the plaintiffs the rent on said house during his stay in Augusta.

That under instructions from his employer, he left Augusta during the month of January, 1911, and paid the plaintiff the note that was due 1 February, 1911, for the rent of said house for the month of January, 1911, and delivered the possession of said house and lot to the plaintiffs, and that the plaintiffs, took possession of and rented said house out to other parties. That by reason of said contract the said notes sued on, all being given for the rent of the house for months subsequent to 1 February, 1911, were not to be paid, and the defendant was under no obligation on said notes to the plaintiffs or their principal.

This evidence was excluded, and the defendant excepted. There was judgment in favor of the plaintiffs, and the defendant excepted and appealed.

ALLEN, J. The record presents two questions:

1. Was it error to refuse to dismiss the action because the plaintiffs are named as agents, and sue on notes payable to them as agents?

2. Was it error to exclude the evidence offered by the defendant?

The evidence offered by the defendant was, in our opinion, clearly competent, and for several reasons:

(1) It tended to prove a separate parol agreement entered into at the time of the execution of the notes, which was to be a part of the contract, and which is not distinguishable in principle from agreements admitted in evidence under the authority of several cases in our reports.

In Braswell v. Pope, 82 N. C. 57, it was held competent to prove that notes given for money were to be surrendered upon the maker signing a judgment and a certain mortgage as security for the money.

In Pennington v. Alexander, 111 N. C. 427, that "The maker of a promissory note or other similar instrument, if sued by the payee, may show as between them a collateral agreement, putting the payment upon a contingency.

In Evans v. Freeman, 142 N. C., 61, that the maker of a note for the purchase money of a stock-feeder could prove by parol that at the time the note was given it was agreed that it should be paid only out of the sales of the stock-feeder, and in Kernodle v. Williams, 153 N. C. 475, that it was competent to prove a parol agreement that the children should pay only so much of notes given by their father as was necessary to pay his debt, and that the balance should be accounted for as an advancement.

(2) The evidence, if believed, proved a total failure of consideration as to the notes sued on. Carrington v. Waff, 112 N. C. 119.

(3) If the defendant could not avoid the payment of the notes, it was competent to prove that he surrendered the house for the rent of which the notes were given, and that the plaintiffs accepted it, for the purpose of charging the plaintiffs with the rents.

For the error pointed out, a new trial is ordered.

New trial.

S. E. BOWSER & CO. v. FOUNTAIN.

128 Minn. 198. (1915)

Action in the District Court for Clay County to recover $162 for goods sold and delivered. The case was tried before Nye, J., and a jury which returned a verdict in favor of defendants. From an order

denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

HALLAM, J. It is an elementary proposition "that where, in the absence of fraud, accident or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto." Wheaton Roller-Mill Co. v. John T. Noye Mnfg. Co., 66 Minn. 156, 159, 68 N. W. 854, 855.

It is also well settled that "Where a contract is silent as to the time of performance, the law implies that it is to be performed within a reasonable time; and, if the contract be in writing, parol evidence of an antecedent or contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself." Liljengren F. & L. Co. v. Mead, 42 Minn. 420, 424, 44 N. W. 306, 308.

Another rule equally well settled, however, is that, in case of a simple contract in writing, it is competent to show by parol that, notwithstanding the delivery of the writing, the parties intended and agreed that it should be operative as a contract only upon the happening of a future contingent event, or the performance of a condition. Westman v. Krumweide, 30 Minn. 542; 35 N. W. 255; Merchants Exchange Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1048. The purpose and effect of such evidence is to prove a condition precedent to the attachment of any obligation under the written instrument, but to prove that no contract was ever made, that its obligation never commenced.

We come now to the question whether there is in this case evidence, to submit to the jury, of an agreement that the delivery of the order was conditional, and that it should become operative only on the happening of a contingency or the performance of a condition. We think there is. The testimony of the defendants was to the effect that plaintiff's salesman was advised that defendants wanted the outfit for the installation in a garage then under construction; that they wanted it delivered before the floor of the garage was in, and for that reason wanted it within two weeks time; that the salesman did not know whether he could make delivery within that time or not. He said he could do so if he could get the outfit in Minneapolis, but that, if it became necessary to ship from Fort Wayne, it would be impossible to

do so, and that defendants then gave the written order "on condition * * * that if he could deliver the goods in two weeks' time, or thereabouts, it would be a deal; otherwise it would be thrown out." We think this evidence was sufficient to sustain a finding that the delivery of the order was conditional upon ascertainment of the fact that the goods could be delivered in two weeks or thereabouts.

Order affirmed.

BURKE v. DULANEY.

153 U. S. 228. (1893)

This action was brought by the testator of the appellees, upon a writing purporting to be the promissory note of the appellant for forty-three hundred and eight dollars and eighty cents, dated Salt Lake City, Utah, August 10, 1883, and payable one year after date, for value received, at the bank of Wells, Fargo & Co. in that city, with interest at the rate of six per cent per annum from date until paid.

The defendant, Burke, denied his liability upon the note, and at the trial below was sworn as a witness on his own behalf. In support of his defense, as set forth in the answer filed by him, he stated the circumstances under which the note was given. He said: "Mr. Dulaney bought this group of mines—the Live Yankee and the Mary Ellen. He came to the Walker House in Salt Lake, and wanted me to run them for him. I said I would not do it unless I got a show to get some interest in the property." To this testimony the plaintiff objected, and, the defendant admitting that the agreement referred to by him was oral, the objection was sustained. To this ruling he excepted.

Being asked what he did after giving the note in suit, he answered: "I gave the note. I worked on the property, which was done some time in September; worked the property until March; settled up all of its debts, paid them, notified Dulaney I wanted nothing more to do with the property; that I was going to Idaho Territory, to Coeur d' Alene mines, and as I was ready to give him a deed at any time he would send me my note. That is all." Objection being made by the plaintiffs to this testimony, the defendant offered to prove "that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price of the interest that Mr.

Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned." He offered also to prove that after inspecting the property and testing it, the defendant notified testator that he did not want the interest; that he was prepared to make a deed for the interest to the latter, and demanded the delivery of his note. All this evidence was excluded by the court upon motion of the plaintiffs, to which ruling the defendant excepted.

The defendant having stated that the conversation with the testator above referred to, and which was excluded by the court, took place prior to the execution of the note, he offered to prove that at the time the note was made, the same agreement was made orally between him and the testator. This testimony was also excluded, and he excepted.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

The general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this court, especially in cases in which it was sought to deprive bona fide holders of or parties to negotiable securities of the rights to which they were entitled according to the legal import of the terms of such instruments. Renner v. Bank of Columbia, 9 Wheat. 576, 587; Brown v. Wiley, 20 How. 442; Specht v. Howard, 16 Wall. 564; Forsythe v. Kimball, 91 U. S. 291; Brown v. Spofford, 95 U. S. 474; Martin v. Cole, 104 U. S. 30; Burnes v. Scott, 117 U. S. 582; Falk v. Moebs, 127 U. S. 597.

The authorities cited do not determine the present case. The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the court, *did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding* upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that

there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. The authorities supporting these views are numerous.

The judgment is reversed and the cause is remanded, that a new trial may be ordered, and further proceedings had in conformity with this opinion.

JAMESTOWN BUSINESS COLLEGE ASSN. v. ALLEN.

172 N. Y. 291. (1902)

WERNER, J. Under the unanimous affirmance by the Appellate Division of the judgment entered upon the verdict of the jury herein, the only question presented by this record that survives to reach this court is the single exception taken by the plaintiff to the admission of parol evidence, given by the defendant, in contradiction of the written instrument upon which the action is founded. I think that the exception referred to was well taken. The action is upon a promissory note. The complaint is in the usual form in such actions. The answer alleges want of consideration and an agreement that the note was not to be paid if the defendant did not take the course of instruction at plaintiff's school, for which the note was given. Upon the trial, under these pleadings, the plaintiff introduced the note in evidence and rested its case. Thereupon the defendant, under the direction of the court, assumed the affirmative of the issue and introduced evidence in support of the allegations of her answer. Despite plaintiff's objection to any oral testimony tending to vary or contradict the written instrument, the defendant was permitted to testify that the note in suit was not to be paid if she should decide not to attend plaintiff's school and could not sell her scholarship. I think this ruling of the trial court was erroneous, and that the exception requires a reversal of this judgment.

The general rule, that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms, applies to promissory notes and bills of exchange. (Thompson v. Ketcham,

8 Johns, 190; Norton v. Coons, 6 N. Y. 33; Read v. Bank of Attice, 124 N. Y. 671.)

As stated in Thomas v. Scutt (127 N. Y. 133) and Stowell v. Greenwich Ins. Co. (163 N. Y. 305), there are two classes of exceptions to this general rule of evidence. The first class includes those cases in which parol evidence is received to show that a written instrument which purports to be a contract is in fact no contract at all. The other class "embraces those cases which recognize the instrument as existing and valid, but regard it as incomplete, either obviously or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. Receipts, bills of parcels and writings that evidently express only some parts of the agreement are examples of this class which leaves the written contract unchanged, but treats it as part of an entire oral agreement, the remainder of which was not reduced to writing. Two things, however, are essential to bring a case within this class: 1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract. 2. The parol evidence must be consistent with and not contradictory of the written instrument."

I think the case at bar does not fall within either of these exceptions. In form, the instrument sued upon is a complete contract. This is equally true as regards the note alone, or the note and the certificate of scholarship together considered as parts of the same contract. If it is a contract at all, it is a complete contract. The oral evidence received over plaintiff's objection did not serve to amplify or complete the writing; it was radically contradictory thereof. The mere statement of this fact is the only argument necessary to show that the case is not in the class of cases in which oral testimony is received to complete contracts which are only partly reduced to writing. Does the oral testimony received over plaintiff's objection tend to show that the written instrument, which was a complete contract in form, was in fact no contract? This question suggests the distinction between this case and the cases upon which the defendant relies. According to the testimony of the defendant the delivery of the note in suit was not conditional upon the happening of some event before it was to become a binding obligation; on the contrary, it is said to have been complete and unconditional. The defendant says, in substance, that the note became effective at once and was to be binding upon her unless she

should decide not to take instructions at plaintiff's school and could not sell her scholarship, in which event it was to be canceled and she was not to be called upon to pay it. Had the parties agreed that the note should not be regarded as completely delivered until the defendant should take such instructions, or until she could sell her scholarship, it would not have become operative until either of these events had transpired. The agreement which the parties did make was just the reverse of that. The note is stated to have been actually and unconditionally delivered, and was to be and remain a note until the defendant should decide either to sell the scholarship, if that were possible, or to abandon the projected course of instruction. As the note was not payable until a year after its date, and the course of instruction was not to begin until the note became due, the defendant's claim is, in reality, an assertion that the note was to be regarded as a valid and binding obligation until it became due, when it was to be optional with the defendant to decide whether it should then be payable or not. This was not a conditional delivery which held the consummation of the contract in abeyance, but an absolute delivery which, as the defendant supposed, could be annulled in a certain contingency at her option. It is obvious, therefore, that there is a radical distinction between a conditional delivery, which is not to become complete and effective until the happening of some condition precedent, and a complete delivery, like the one at bar, which is sought to be defeated by subsequent contingencies that may or may not arise. In the one case there is no contract until the condition has been complied with; in the other there is a binding contract, notwithstanding the happening of the contingency relied upon to defeat it. For the foregoing reasons the cases of Seymour v. Cowing, (1 Keyes, 532); Reynolds v. Robinson, (110 N. Y. 654); Blewitt v. Boorum, (142 N. Y. 357); Higgins v. Ridgway, (153 N. Y. 130), and kindred cases, holding that conditions limiting and circumscribing the delivery of written instruments may be shown by parol are not applicable to the case at bar.

This case seems to fall directly within the principle "that parol evidence of an oral agreement made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add or to subtract from the absolute terms of the written contract." (Specht v. Howard, 16 Wall. 564; Forsyth v. Kimball, 91 U. S. 291; Brown v. Wiley, 61 U. S. 442; Brown v. Spafford, 95 U. S. 474; Read v. Bank of Attica, 124 N. Y. 671.)

For these reasons I think the parol evidence above referred to was

erroneously admitted, and, therefore, the judgment herein should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed, etc.

QUARRY CO. v. CLEMENTS.

38 Ohio 587. (1883)

So far as necessary to present the point reserved for decision the following is a statement of the facts:

The action below was brought by The Baldwin Quarry Co., the present plaintiff, against Robert J. Clements, defendant, to recover a balance due for stone furnished for and used in the construction of a bridge by defendant for Cuyahoga county. The contract was in writing, and stipulated "That said party of the second part agrees to furnish to the said party of the first part, good bridge stone at $4.50 per perch, to be measured in the wall. And said party of the second part agrees to furnish to said party of the first part, perch stone at $1.50 per perch, to be measured in the wall. The above described stone is to be used in the erction and building of a bridge or culvert to be built on Columbus Street, at or over the stream known as Big Creek, and said stone is to be delivered on the ground where said bridge or culvert is to be built, at the above price." The defendant pleaded that he did not owe, etc. The case was tried to a jury and resulted in a verdict and judgment for plaintiff. The district court reversed the judgment for error in rejecting certain evidence offered by defendant. The amount due plaintiff turned on the meaning of the word perch, as used in said contract. The plaintiff, on the trial, for the purpose of making good his claim, offered evidence tending to show that by the usage of the business, 16½ cubic feet was a perch, while the defendant, for a like purpose, offered evidence that by such usage 25 feet made a perch. The weight of this evidence was, in substance, that in small jobs, such as cellar walls and foundations, in Cleveland and vicinity, the usage was to count 16½ feet to the perch, while in all railroad masonry it took 25 feet. As to bridge masonry, such as this was, the evidence failed to show that there was any fixed or definite meaning to the word, or any uniform usage as to the quantity of stone it took to make a perch. The effect of this testimony was that the term perch was ambiguous, and, as applied to this kind of work, might mean 16½

feet or 25 feet indifferently. In this state of the proof, and for the purpose of showing what the parties really intended by the use of this term, the defendant offered to prove the conversation of the parties at and before the contract was reduced to writing and signed, which resulted in a verbal agreement as to the terms of the contract, and their instructions to the attorney, who, at their instance, reduced the same to writing, in which of the two senses the word perch was used. He offered to show that the verbal agreement was for 18 cents per cubic foot, and that Graves, the attorney by whom it was reduced to writing, of his own motion, and without instructions from either party, inserted "$4.50 per perch" instead of 18 cents per cubic foot, which is the same price if 25 feet be counted as a perch.

This testimony was rejected. The district court held this was error.

JOHNSON, J. The evidence of usage failed to show that either sixteen and one-half or twenty-five cubic feet made a perch, in this class of work. It left the meaning of the term perch ambiguous and uncertain. In this state of the proof, the defendant offered to prove that the word perch was not used by either of them, and that the parties verbally agreed on 18 cents per cubic foot as the price of the stone, and that the attorney employed to reduce the contract to writing, of his own motion, and without instruction from either party, made the change from feet to perch, and the price from 18 cents per cubic foot to $4.50 per perch, this being at the same rate, if twenty-five feet is a perch, but if sixteen and one-half feet is a perch, then the price per cubic foot would be over twenty-seven cents.

In determining the question presented, we can derive little or no aid from the cases where custom or usage is shown, to enable the court to interpret the meaning of doubtful or ambiguous words, or of words or terms that have a special, technical or peculiar meaning, as applied to particular kinds of trade or business. Hence it is not necessary to cite or comment on this class of cases. The rule which admits this kind of testimony is not at variance with the other general rule, that parol contemporaneous evidence is not competent to modify or contradict the terms of a written contract. The object of evidence of such usage is not to vary or modify the writing, but to ascertain its meaning, when words and terms are used which are ambiguous, or have a technical or particular signification when applied to the subject matter.

In the present case, the claim is, that the rejected evidence was not offered to vary, modify or contradict, the terms of the contract, but, as the evidence of usage in the business left the word used ambiguous, it was proper to show in what sense the parties used it. When that

is ascertained, the contract has a definite meaning, and its terms, as construed in the light of this evidence constitute the measure of obligation. The reason why usage is resorted to is to ascertain, not to vary, the intention of the parties, inasmuch as they are presumed to have contracted with reference to the known usage of the business. For the purpose for which this rejected evidence was offered, we think it was competent. The parties used a word employed in the kind of business in which they were engaged. As applied to this kind of work, it had no general meaning nor any fixed technical meaning.

The object was not to vary, but to develop the meaning of the contract, by ascertaining the sense in which this word was intended to be used. Numerous text books and cases could be cited illustrating this rule and its proper limitations. Thus, where the defendant's agent, by letter, offered to purchase plaintiff's wool. In the correspondence the offer was in terms to purchase "your wool." Evidence of previous conversations between the parties was admitted, showing that the plaintiff had some wool, of his own clip, and some he had purchased, which he was offering for sale. The object of this evidence was to show in what sense the defendant used the term "your wool", by showing, by their previous negotiations, that at the time the offer by letter was made, he did not refer to the wool from plaintiff's clip merely, but to all the seller had on hand. Lord Campbell says: "There cannot be the slightest objection to the admission of evidence of previous conversations, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject matter referred to therein." There the subject matter, as was shown by extrinsic evidence, was uncertain, and oral evidence was admitted to fix or ascertain the meaning of the term "your wool". McDonald v. Longbottom, 102 Eng. Com. Law. 977.

So where there was a sale, by written contract, of "winter strained lamp oil", equal to a sample exhibited, the proof showed there were two kinds of such oil: one sperm oil, the other whale oil, the latter of which was inferior in quality. Evidence was held admissible to show that, in conversation at the time the contract was made, this was explained to the purchaser, and that he was then informed that it was not sperm oil he was selling. Hart v. Hammett, 18 Vt. 127.

In a contract made in Alabama during the rebellion, to pay "dollars", parol evidence was admitted showing the circumstances under which the contract was made, and that, in fact, at the time and place, the only dollars in use were Confederate dollars. Thorington v. Smith, 8 Wall. 1.

In the charter of the whole tonnage of a vessel, except necessary quarters for the officers and crew and storage of provisions, water and fuel, proof of conversations between the parties, when in negotiations in relation to the excepted parts required for use by the officers and crew was properly admitted, as it did not tend to vary or contradict the written contract, but only to point out the subject to which it applied. Almgren v. Dulith, 1 N. Y. 28. Without extending quotations, we add a few authorities where this principle is adhered to: Shore v. Wilson, 9 Cl. & F. 555; Barret v. Stow, 15 Ill. 423; Gray v. Harper, 1 Story 574; Brown v. Brown, 8 Met. 576; Attorney General v. Shore, 11 Sim. 592-632; Wharton on Evidence, par. 938-943; Stoops v. Smith, 100 Mass. 63; Miller v. Stevens, Ibid. 518; Sweet v. Shumway, 102 Mass. 367.

So in a contract for "ware potatoes", where on the trial it appeared there were two kinds of "ware potatoes" known in the market one inferior to the other, parol evidence to show that the contract was in fact, for the best, was admissible, for the reason, as we suppose, that by the terms of the contract the seller was not limited to a delivery of that kind, which was of best quality, if the inferior kind was within the term "ware potatoes", and therefore the evidence went to vary the written contract. Smith v. Jeffries, 15 Mees. & W. 561.

If books are referred to, they furnish no certain guide. Webster says 16½ feet make a perch. Worcester gives no definition in cubic measure. The New American Encyclopaedia says 25 feet. In some arithmetics 16½ feet, in others 25 feet, while in others again 24¾ feet, are given as a perch. In Haswell's Engineers & Mechanics' Book —a leading authority on the subject, and one in general use—24¾ feet are given as a perch of stone. In this state of doubt and uncertainty, and in the absence of an express statutory definition, we hold that the rejected testimony was admissible, to show in what sense the word was used in the written contract. It does not tend to vary the terms of the writing. It simply enables the court to ascertain what its terms mean, and to construe and enforce it as the parties intended. It is proper to add that it does not appear that the error, in rejecting this evidence, was cured by the verdict.

The judgment of the District Court is affirmed.

COLONIAL JEWELRY CO. v. BROWN et al.

38 Okla. 44. (1913)

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, upon a jewelry contract or order. At the commencement of the action, an order of attachment was issued upon an affidavit of the plaintiff, to the effect that the defendants were attempting to dispose of and otherwise conceal their property with intent to hinder and delay plaintiff in collecting its debt, and was otherwise violating the Bulk Sales Law of the state of Oklahoma, Comp. Law 1909, secs. 7908-7910 (Rev. Laws 1910, secs. 2903-2905). The defendants admitted the execution of the contract sued upon, but alleged that the same was placed into the hands of the defendants under an agreement, whereby it was not to become effective until five days after its execution, during which time the defendants were at liberty to cancel the order. They further alleged that the goods were shipped before the expiration of the five days, notwithstanding the defendants in the meantime had notified the plaintiff that they did not want the goods described in the order, and requested it to cancel the same. They further alleged that they had in no way violated the Bulk Sales Law of the state of Oklahoma and that no grounds for attachment existed, and that by reason of the wrongful suing out of the same they had been damaged in the sum of $500. Upon a trial to a jury upon the merits, a verdict was returned for the defendants in the sum of $100 and the dissolution of the attachment, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Counsel for plaintiff in error presents his grounds for reversal under three heads, as follows:

"(1) The trial court erred when it permitted defendants to introduce parol evidence to contradict and vary the terms of a written contract, by which evidence a verbal agreement was shown different from the written, but not incorporated therein, and made prior to and contemporaneous with the written instrument. (2) The trial court erred in giving the instructions that were given. (3) The trial court erred in refusing to give the special instructions asked for by the plaintiff."

Counsel states his position in his brief in effect as follows:

When defendants signed the contract sued upon, the same became and was a binding obligation, and was not subject to countermand, especially after the order had been received and the goods delivered

to an express company for delivery to defendants as per order; and defendants are estopped from setting up a different verbal agreement made prior to and contemporaneous with the written contract, whereby the contract was not to take effect until the member of the partnership who signed the same and could see the other partner and discuss with him the deal, and parol testimony tending to prove said agreement was unquestionably inadmissible, and this one proposition, involves the whole case.

We do not understand that evidence offered for the purpose of showing that a written instrument was delivered conditionally constitutes contradicting or varying a written instrument by parol. Such evidence does not tend to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. A written contract must be in force to make it subject to the parol evidence rule.

Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. Tovera v. Parker, 34 Okla. 74, 128 Pac. 101; Horton v. Birdsong, 35 Okla. 275, 129 Pac. 701. In Lions v. Stills, 97 Tenn. 514, 37 S. W. 280, it was held:

"When an unconditional note is given for the purchase of certain property, parol evidence is admissible to show an option on the part of the purchaser to rescind the sale within a certain time, as this does not contradict the note, but sets up an independent agreement made at the same time, that upon a condition or contingency the note was to become void."

Mr. Joyce in his Defence to Commercial Paper (section 312) makes the distinction between the two classes of cases very clear:

"No rule is more elementary than that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument. This is not to vary or contradict a written instrument, but to prove that no contract was ever made; that its obligations never commenced."

As the instructions refused and given are objected to upon the theory that the first contention of plaintiff in error is correct, what we have already said disposed of such assignments of error. Counsel for plaintiff in error in conclusion says that "we submit there

was no evidence to sustain a verdict of $100 against plaintiff for the wrongful suing out of said attachment." We have examined the evidence, and are of the opinion that it reasonably tends to support the verdict of the jury.

The judgment of the court below is therefore affirmed.

All the Justices concur.

HAPKE v. DAVIDSON.

180 Mich. 138. (1914)

KUHN, J. The defendant, James Davidson, prior to February 20, 1904, was interested in a factory at Dresden, Ontario, for the manufacture of beets into sugar. The operation of the factory not being successful in that locality, he made a contract with the plaintiff, Theodore Hapke, who was an expert agriculturist, to remove the same.

The issue thus formed being submitted to the jury, a verdict in the sum of $1,917 for the plaintiff was returned. Judgment being brought to this court by writ of error.

The circuit judge held and instructed the jury that there could be no recovery for services performed or the expenditures made prior to February 20, 1904, for the reason that all these matters had merged in the contract. The defendant offered in evidence certain correspondence between the parties prior to that time, and also endeavored to show conversation which took place between the parties in the office of the attorney at the time the contract was made. In the letter of February 13, 1904, written by the defendant to plaintiff at Janesville, he said, after discussing the removal of the factory in question:

"And of course we would also want it distinctly understood that we could not allow anything for any promotion, expenses or anything of that kind."

It is clear that the purpose of offering this letter and a draft of the proposed contract made previous to the meeting in the attorney's office, when the agreement was actually signed, was to vary the terms of the contract as construed by the court, and was an effort to show that the claimed items for extras were intended to be within the terms of the agreement. The rulings of the court in excluding these writings were proper. It must be assumed that the contract as made was the culmination of the negotiations between the parties, and, its terms not

being ambiguous, these writings were inadmissible. Eaton v. Gladwell, 108 Mich. 678 (66. N. W. 598); Mouat v. Montague, 122 Mich. 334 (81 N. W. 112); 17 Cyc. p. 596. The evidence of the conversation had before the contract was also inadmissible. Cohen v. Jackoboice, 101 Mich. 409 (59 N. W. 665); R. K. Carter & Co. v. Weber, 138 Mich. 576 (101 N. W. 818); Wallace v. Kelly, 148 Mich. 336 (111 N. W. 1049, 118 Am. St. Rep. 580); International Text-Book Co. v. Marvin, 166 Mich. 660 (132 N. W. 437).

Reversed on another ground.

WILLIAM ENNIS v. WILLIAM D. WRIGHT.

217 Mass. 40. (1914)

Contract for the alleged breach by the defendant of a contract in writing dated August 27, 1910, by which the defendant, doing business as the Massachusetts Engraving Company, agreed to employ the plaintiff for one year from the date of the contract.

The evidence showed that the plaintiff worked under the terms of the contract until February 3, 1911, when he was discharged by the defendant, and it was a material issue in the case whether, as the plaintiff contended, he was discharged because he was a union man or whether, as the defendant contended, he was discharged for misconduct.

The plaintiff testified that he lived in Rochester, New York, up to August 23, 1910; that he had a letter from the defendant in regard to coming to Boston and entering the employ of the defendant in July, 1910; and that after the receipt of this letter one Hickman called upon him. He was asked, "Well, what did Mr. Hickman say?" The question was objected to, and, for the purpose of showing the authority of Hickman, a letter written by the defendant to the plaintiff on August 10, 1910, was introduced in evidence. The letter referred to Hickman as follows: "I understood from Mr. Hickman that the probabilities were you would come at once." After the introduction of this letter in evidence the question was repeated, "Now what did Mr. Hickman tell you when you saw him?" The question was objected to on the ground that the statement in the letter was not sufficient to qualify Hickman as an agent to make declarations which would bind the de-

fendant as principal. The judge admitted the evidence and the defendant excepted.

The conversation, as testified to, was in part to the effect that the plaintiff stated that he was informed that there were labor troubles in Boston, and that Hickman represented to him that there was no trouble in the defendant's shop. This was all the evidence bearing upon the question of Hickman's agency at the time the evidence was introduced.

The jury returned a verdict for the plaintiff in the sum of $394; and the defendant alleged exceptions to the admission in evidence of the plaintiff's conversation with Hickman.

HAMMOND, J. The plaintiff was discharged before the end of the year, and the only question finally left to the jury was whether the defendant was justified in so discharging him, the plaintiff contending that the cause of his discharge was that he was a "union man," and the defendant contending that the cause was the misconduct of the plaintiff. There was evidence in support of each contention.

The only question before us is whether the conversation between the plaintiff and one Hickman was properly admitted. Clearly it was not admissible to prove the terms of the contract, because the contract subsequently was reduced to writing. But the burden of showing the scope of Hickman's authority was upon the plaintiff; and the chief objection is that there was no evidence outside the conversation itself tending to show the authority of Hickman to make any representation about the existence of labor troubles, or to guarantee that there were no labor troubles in the defendant's shop, or to "guarantee the rest of the conditions." Of course the scope of the authority cannot be proved by the statement of the agent alone. The admission of the evidence therefore was error.

It is urged by the plaintiff however that the error, if any, was not prejudicial to the defendant. But it is to be presumed that the jury thought they had a right to take it into consideration, and it is obvious that it might lead them into a train of thought not logical to the issue and yet harmful to the defendant.

Exceptions sustained.

VOGT v. SCHIENEBECK.

122 Wis. 491. (1904)

Action to recover damages for breach of contract for the sale of lumber. The complaint was to the effect that defendant contracted to sell plaintiff 100,000 feet of one-inch pine lumber then owned by the former and piled at Stadler's mill, near the village of Butternut, Wisconsin, at $8 per thousand feet for the culls, and $15 per thousand feet for common or better, delivery to be made to the plaintiff free on board cars at Butternut upon demand by him within two months from November 15, 1902, and the customary inspection fees to be paid one half by each party; that defendant breached such contract by refusing to deliver the lumber when the same was duly demanded, or at all, to the plaintiff's damage in the sum of $1,500.

The defendant, for answer to the complaint, denied all the allegations thereof, and alleged the making of a contract substantially as stated in the complaint, except that it was agreed, as part of such contract, that the cars for use in delivering the lumber to the plaintiff were to be furnished by him, the lumber to be delivered only upon his demand within two months after November 15, 1902; that he would furnish the inspector to examine, grade, and measure the lumber, the expenses to be paid equally by the parties; and that plaintiff did not within the time specified, or before the commencement of the action, demand the lumber or furnish cars for use in delivering the same, or furnish or offer to furnish the inspector; that on the contrary he at all times neglected to make any demand for the lumber, and refused to accept the same.

The evidence showed that the contract was in writing and as follows:

"Received of Paul Vogt of Milwaukee, Wil., Five (5) Dollars on account of sale to him by me, made this 15th day of November, 1902 of 100,000 feet more or less of pine one-inch lumber at Eight Dollars per 1,000 feet cull & Fifteen Dollars per 1,000 feet common or better now at Stadler's Mill, f. o. b. cars Butternut, Wis., to be delivered upon demand within two months from above date. Inspection fees paid by both of us.

"Dated at Butternut, Wis., Novbr. 15th, 1902.

"JOSEF SCHIENEBECK."

Evidence was allowed, against objections by plaintiff's counsel, to effect that at the time such contract was made plaintiff verbally agreed

to furnish the cars for use in delivering the lumber; also as to what the custom was between buyer and seller in regard to such matters.

MARSHALL, J. There was evidence on the part of the defendant to the effect that at the time of the verbal agreement preceding the making of the written contract, plaintiff said he would furnish the cars. The learned trial court denied the motion for judgment, assuming that such evidence raised a question for the jury. That is plain, because he expressly referred to such evidence in submitting the cause as to whether the plaintiff did or did not agree to furnish the cars. In that it seems the rule, that a written contract cannot be varied by parol evidence of what was said between the parties prior to or at the time of the making of the writing, was overlooked. The final result of all negotiation eventuating in the making of a contract which is reduced to writing, in the absence of relievable fraud or mistake, is conclusively presumed to be embodied therein, unless the writing appears clearly to be merely a part execution of an entire verbal contract, which is not the case in the instance before us. Here was the ordinary occurrence of closing contractual negotiations by reducing the consequent verbal agreement to writing. If, in doing so, anything was left out, the party prejudiced is without remedy upon the contract except to appeal to equity for its reformation and the enforcement thereof as corrected. John O'Brien L. Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337; Braun v. Wisconsin R. Co., 92 Wis. 245, 66 N. W. 196; Herbst v. Lowe, 65 Wis. 316, 26 N. W. 751. In Braun v. Wisconsin R. Co. it was said that the execution mentioned, to the exclusion of evidence of what was said or occurred at the time of making a written contract, is never to be so extended as to permit evidence of mere contemporaneous stipulations or conditions, the writing being the agreement reached and not a mere part performance or incident of it. It follows that the oral testimony as to what plaintiff said respecting who was to furnish the cars, when the contract was made, cannot be regarded as a justification for denying appellant's motion for a verdict.

By the court.—The judgment is reversed, and the cause remanded for a new trial.

HARTMYER v. EVERLY.

73 W. Va. 88. (1913)

ROBINSON, Judge:

The action is ejectment. The jury found for defendants, and judgment followed accordingly.

There is clearly no ambiguity in the deeds. Looking to them, we find them certain as to meaning in the description of the land. Not a single term indicates that they were meant to convey the land by the description in the patent. They cannot be changed by the assumption that they are unambiguous. No part of the description in a deed is inconsistent with the remaining part, and thus shown to be erroneous, it may be rejected; or, when the description given is uncertain and ambiguous, parol or extrinsic evidence will be admitted to show to what it truly applies. But where terms are used in a description which are clear and intelligible, the court will put a construction upon those terms, and parol or extrinsic evidence will not be admissible to control the legal effect of such description. Devlin on Real Property and Deeds, sec. 1042; Bond v. Fay, 12 Allen, 86. Plaintiffs could not change the terms of their deeds by extrinsic evidence, as they were permitted to undertake to do. They could not, in ejectment, reform the deed by which they held their land, so as to take in the parcel sought to be recovered. This case is controlled by a well known general rule which has been concisely stated as follows: "Where the description in a deed of the premises intended to be conveyed is clear and free from ambiguity, it can not be varied, controlled, or contradicted by parol or extrinsic evidence. In such case the deed must be held to be conclusive evidence as to what land is intended by the grantor to be conveyed, the quantity of land, and likewise the conclusive evidence of his intention to include in or exclude from the instrument particular land" 17 Cyc. 616.

Plaintiffs' evidence did not appreciably tend to make a case. The jury having reached a verdict that the court should have directed, the judgment entered thereon will be affirmed.

Affirmed.

UIHLEIN v. MATTHEWS.

172 N. Y. 154. (1902)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 1, 1901, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

O'BRIEN, J. The judgment in this action awarded a permanent injunction against the defendant, restraining her from using or permitting the use of her premises as a place for the sale of ales, beers, wines and liquors, for the period of five years from May 4, 1898.

The precise question is whether a person who has an interest in the real property of his next neighbor in the nature of an easement, and who conveys absolutely, without any exception of reservation of such easement, can afterward be permitted, in an action to enforce the right involved in the easement, to show by parol that he intended to retain it, notwithstanding his deed. We think that the testimony was inadmissible. The deed in terms, as we have seen, purported to convey all the right, title and interest to the grantor. The language employed necessarily included any easement that the grantor had or claimed with respect to the premises conveyed, and it was not competent to show by parol evidence that the easement was reserved or excepted. It was a violation of the rule which excludes such evidence to vary, explain or contradict a written instrument that was complete in itself and without ambiguity in its terms. The legal effect of the deed upon the words embodied in the conveyance, and not with reference to what the grantor thought or understood. When words have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning. That deeds or other written instruments cannot be varied, enlarged or restricted by evidence of that character appears from the words of the statute and the general consensus of authority. (Chap. 647, Laws of 1896, sec. 205; Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495; McCluskey v. Cromwell, 11 N. Y. 601; Green v. Collins, 86 N. Y. 254; Thomas v. Scutt, 127 N. Y. 133-138; Case v. Phoenix Bridge Co., 134 N. Y. 78; Englehorn v. Reitlinger, 122 N. Y. 76; House v. Walch, 144 N. Y. 418; Devlin on Deeds, sec. 837.) It follows that all parol evidence tending to show that, notwithstanding the clear and comprehensive words of the quitclaim deed, the grantor therein still retained the right to restrict

the grantee in the use of the property conveyed should have been excluded.

The judgment should be reversed, and a new trial granted, costs to abide the event.

ARMSTRONG v. GRANITE CO.

147 N. Y. 495. (1895)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 9, 1893, which affirmed a judgment in favor of defendant, dismissing the complaint upon the merits.

ANDREWS, Ch. J. This action was brought to restrain the defendants from quarrying granite upon lot 27, Split Rock tract, in Essex county. Both parties claim title to the granite.

The whole question, as above intimated, turns on the interpretation of the words "minerals and ores" in the second deed. In view of the conclusion we have reached and to avoid possible misconceptions in the future, it is proper to state that in our opinion the evidence given and admitted on behalf of the defendant under objection by the plaintiff, that the purpose of Bridgford and his co-grantees in securing the deeds of 1871 was to acquire the iron ore then supposed to exist on the premises, and of their statements contemporaneously with the purchase, that they had purchased the iron ore on the lot, was incompetent to explain or confine the meaning of the words "minerals and ores" in the deed of May 18, 1871. The evidence would have been incompetent if it had related to the motives of the parties to the deed sought to be established by the oral statements or negotiations between them prior to or contemporeaneous with its execution. The words of a deed, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument. Such proof might, under some circumstances, be competent in an action between the parties to reform the instrument, but not in determining the rights of the parties under the instrument as written. The incompetency of the evidence received as to the motives of the original grantees and of their statements as to what they intended to purchase or had purchased, is still more manifest in view of the fact that they were disclosed and the statements made to third

parties not connected with the sale. (See Voorhees v. Burchard, 55 N. Y. 98.)

Judgment affirmed.

CHANNEL COMMERCIAL CO. v. HOURIHAN.

20 Cal. App. 647. (1912)

JAMES, J. This is an action for damages alleged to have been suffered by plaintiff through breach of contract committed by defendant. Plaintiff alleged in its complaint that on the thirtieth day of September, 1910, in the county of Santa Barbara, it purchased of defendant one thousand sacks of beans at the rate of 4½ cents per pound, to be delivered at once, and that defendant failed and refused to deliver the same. As evidencing the alleged contract of sale, plaintiff set out in its complaint that a memorandum of the agreement had been made in the following form: "Sep. 30, '10. Rec'd C. C. Co., $160.45 to apply on 1 M. sk lot pink beans as per sample at 4½c. M. P. Hourihan."

The vital question in the case, however, depends upon what construction shall be given to the receipt as signed by defendant and as set out in plaintiff's complaint. If that instrument contains sufficient terms to evidence a complete contract of sale and purchase, then all of the testimony introduced which tended to vary or limit the effect of that agreement would be irrelevant and incompetent. (Code Civ. Proc., sec. 1856.) By the section last referred to it is provided that where an agreement is reduced to writing, it must be considered as containing all of the terms agreed upon, except that evidence may be introduced of the circumstances under which the agreement was made, or to explain an extrinsic ambiguity, receipt, so called, of itself evidenced by a contract of sale. Plaintiff only treated it as a mere memoranda which required explanation by oral testimony and there seems not to have been any special objection made on the part of plaintiff to the introduction of any of the testimony of defendant wherein he gave his version of the transaction. The rule is that where a writing imports upon its face to be a complete expression of the whole agreement, it is then presumed that the parties have introduced into it every material item and term. (Harrison v. McCormick, 89 Cal. 327 (23 Am. St. Rep. 469, 26 Pac. 830.) In the case of Gardiner v. McDonogh, 147 Cal. 313 (81 Pac. 964), relied upon by appellant, the memorandum stated in express terms that

the parties had that day "bought" a certain quantity of beans, stating the name of the beans but not otherwise designating them as beans. Here no words are contained in the written receipt appropriate to convey the meaning of sale or purchase and undoubtedly oral testimony was admissible to explain just what the obligations of the parties were in the entire transaction. The instrument was in the nature of a receipt only, in the consideration of which it has been often held that the terms of such documents are not conclusive, but that they may be explained or varied by parol proof. (Snodgrass v. Parks, 79 Cal. 55. [21 Pac. 429.]) As we have before noted, it appears from the record that both parties at the trial considered that the true transaction was to be established in the main by oral proof, for both sides offered such proof, and that offered on the part of the defendant to this point was not objected to. We can on this review have no concern as to whether the preponderance of evidence tended to sustain the plaintiff's contentions, or those of the defendant. That was a matter solely for the determination of the trial court and its conclusions thereon must be treated as final.

The order denying a new trial is affirmed.

ALLEN, P. J., and SHAW, J., concurred.

A petition to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on February 14, 1913.

TRACY v. THE UNION IRON WORKS.

104 Mo. 193. (1891)

BARCLAY, J. Plaintiff brought this action to recover certain instalments of rent, due from defendant according to the covenants of a lease dated April 24, 1884, under the seals of both parties, whereby plaintiff let certain business property in Kanass City, Missouri, to defendant for one year from May, 1884, on terms, one of which was the payment of $1,000 rent during that period. Defendant went into possession and concedes non-payment of the rent in dispute. The reason therefor appears in the counterclaim interposed. That part of defendant's answer and the evidence supporting it raise the only question presented on this appeal.

Defendant's position is that the rent due is subject to reduction to

the extent of damages sustained by defendant by the breach of a verbal agreement between plaintiff and defendant, the admissibility of which in evidence is the point in dispute.

The trial court heard defendant's testimony on the subject fully (over objections), and then directed a verdict for plaintiff, a stipulation having been made at the outset of the trial, that plaintiff was entitled to recover the amount claimed unless the defense in question was established.

The facts shown on defendant's part were that it was engaged in the manufacture and sale of cornshellers and other farm machinery at Decatur, Illinois. It rented the premises at Kansas City as a storehouse and business office. When the negotiations for the lease began, it was verbally agreed, between plaintiff and defendant's representative, that the former would put in a railway switch (to connect the premises with a railroad near by) for the use of defendant for shipping purposes. Something was then said about inserting this stipulation in the lease, but plaintiff declared it was not necessary as the thing would be done by the time defendant would be ready to use the track after moving in, adding that his word was as good as his bond. Shortly afterwards the lease was prepared in Kansas City, and forwarded to Decatur for signature on the part of defendant. On examining its terms, the defendant made an amendment, by inserting the words, "also office desk room and space for sample machine on first floor" (as they now appear). Then the instrument was formally executed by both parties. It contains no such express agreement as defendant now insists upon, concerning a railway switch.

On this showing the trial court directed a verdict for plaintiff.

Defendant contends that plaintiff's prior agreement to add a railroad switch to the demised premises should be regarded as collateral to the lease, and admissible as such. It is not denied that verbal evidence in contradiction of written, and especially of sealed, documents is usually inadmissible; but the case here is said to belong to a recognized class of exceptions to that rule. Waiving all question that might arise from the form of the lease as a specialty and treating it merely as a written contract, let us examine the merits of defendant's contention.

The general rule excluding evidence of contemporaneous or prior verbal agreements, varying or contradicting the terms of a valid written instrument, is the outgrowth of the common experience of men. It is of great antiquity and appears in other systems of jurisprudence besides our own. Corp. Jur. Civ., Cod. Lib. 4, Tit. 20; Tait's Evid., pp. 326, 327.

It rests on principles somewhat analogous to those which underlie the doctrine of the conclusiveness of judgments upon parties thereto. It is said to be in the interest of the state that there should be an end to litigation. Accordingly, the record that closes a forensic controversy is regarded as merging the matters litigated to the extent declared in the judgment. So, in private adjustments of reciprocal rights, it is wisely considered that, when parties have deliberately put their mutual agreements into the form of a completed written contract, that expression of their intention should be accepted as a finality, in which is merged all prior negotiations within the scope of the writing.

But the rule has too long occupied a place as a cornerstone in the law of evidence to require, at this day, any justification of its existence.

We may, however, properly remark that the adoption of the modern practice, admitting as witnesses the parties directly interested in the action, seems to add a cogent reason to those existing at the common law, for a close adherence to the rule under discussion. If the uncertainty of "slippery memory" furnished a ground for excluding such verbal testimony in the days of Lord Coke (Countess of Rutland v. Earl of Rutland (1604), Coke's Reports, Part 5, 26a), how much stronger reason for such exclusion today when the influence of self-interest is so likely to render the memory of litigating parties more 'slippery" than was that of the witnesses of olden time.

In Missouri the general rule has been repeatedly approved in early as well as recent, decisions. Woodward v. McGaugh, (1843), 8 Mo. 161; Walker v. Engler (1860), 30 Mo. 130; State ex rel. v. Hoshaw, (1889), 98 Mo. 358; Morgan v. Porter, (1891), 103 Mo. 135; 15 S. W. Rep. 289.

There are, however, cases, here and elsewhere, announcing propositions called exceptions to this rule. Some may fairly be so described, as, for example, those admitting parol evidence to contradict a recited consideration, or to show that, in equity, an absolute deed was intended as a mortgage. But it will be found, we think, that many rulings, on this topic, which, at first sight, appear exceptional, are rather instances not embraced within the true meaning and scope of the rule. As such may be mentioned cases in which fraud, mistake or illegality has prevented the written instrument from acquiring original vitality as a contract, or those admitting evidence to identify its subject-matter, as well as others in which the writing, on its face, appears to be an incomplete, or merely one-sided expression of the term of agreement. Rollins v. Claybrook (1856), 22 Mo. 405; Moss v. Green (1867), 41 Mo. 389.

The pending appeal does not demand any attempt to classify the so-called exceptional cases. Especially do we abstain from any effort to indicate what kind of verbal agreements may be shown, collateral to a written one, beyond the requirements of the appeal now actually in hand.

The facts in the present record disclose that the verbal agreement, proposed to be shown, contemplated a substantial addition by the plaintiff to the property which was the subject of the demise, whereas the terms of the written lease between the parties declared that the premises were let "in the present condition thereof."

Obviously the oral testimony in question contradicted the very language of the writing in which these business men, dealing at arm's length, had deliberately expressed themselves. We think the learned circuit judge correctly held such testimony inadmissible and that it could find no proper place in the case made by the pleadings, without departing from sound principle and precedents.

We regard the action of the trial court as correct and accordingly affirm the judgment of the Kansas City Court of Appeals, which was to the same effect. SHERWOOD, C. J., BLACK and BRACE, JJ., concur.

ANDREWS, ALLEN & MOOREFIELD v. TUCKER.

127 Ala. 602. (1900)

This action was brought by the appellees, J. A. & I. C. Tucker, against M. A. Andrews, T. H. Allen and J. D. Moorefield, composing the firm of Andrews, Allen & Moorefield. The third count was for $150 due for work and labor done under a contract between plaintiffs and defendants. The demurrer of the defendants to the third count was sustained. The grading was agreed to be done according to the specifications attached to the contract, and the plaintiffs agreed to finish and complete the grading as specified by the 1st day of March. 1896, "unless prevented by the weather."

SHARPE, J. By the law as it has been settled in this state, a written contract which by its terms is executory as imposing the performance of duties other than the mere obligation of making payment, may while the contract is executory in respect of any part of such duties, be altered, modified or rescinded with or without a writing and without any other consideration than that of mutual assent. Badders v. Davis,

88 Ala. 369; Robinson v. Bullock, 66 Ala. 547; 1 Brick Dig. 394, Sec. 233. And such change under such circumstances may extend to the waiver of any right either party might have had under the original contract but for the new agreement. Cornish v. Suydam, 99 Ala. 620. A waiver of a right to declare a contract forfeited may even be implied from conduct of the parties which is inconsistent with the intention to claim a forfeiture. Accordingly, the fact that the contract here involved was acted upon and treated by the parties as in force after the time specified therein for completion of the work undertaken by plaintiffs implied an agreement on the defendants' part not to treat the failure of completion within that time as a cause of forfeiture. Brigham v. Carlisle, 78 Ala. 243; Stewart v. Cross, 66 Ala. 22.

The judgment will be affirmed.

J. W. RIPY & SON v. ART WALL PAPER MILLS.

41 Okla. 20. (1913)

Action by the Art Wall Paper Mills against J. W. Ripy & Son. Judgment for plaintiff, and defendants bring error. Affirmed.

Opinion by BREWER, C. The Art Wall Paper Mills, a corporation of Dallas, Tex., brought this suit in the District Court against J. W. Ripy & Son, a co-partnership, to recover the purchase price of certain goods, wares, and merchandise, sold and delivered in pursuance of a certain written contract executed by the parties. We will hereafter refer to the parties as they were called in the trial court. The case was tried to a jury, and a verdict returned in favor of the plaintiff. The defendants, plaintiffs in error here, bring up the case on case-made, and in their brief seem to rely upon the following alleged errors: First. Overruling defendants' demurrer to the petition. Second. Placing the burden of proof upon the defendants. Third. The exclusion of evidence offered by defendants.

The evidence, which it is contended the court erred in refusing to admit, was intended to cover several different contentions. It is only referred to in the brief by general statements of counsel, in the main, and is not brought into the brief. We have gone into the record, however, and made some search, and find that the real complaint is in the rejection of oral evidence, clearly intended to either vary, modify, contradict, enlarge, or destroy the plain and unambiguous meaning of

the written contract. For instance, evidence was offered and refused that during the prior and contemporaneous negotiations terminating in the written contract it was agreed that plaintiff would not sell its goods to any other dealer in Oklahoma and Indian Territory: there was no hint of such an agreement in the writing which the parties formally executed, and it very fully defined the rights and duties of both parties. The expressed purpose of the evidence was to so ingraft by oral evidence onto a written contract, legal and valid and in no sense immoral or against public policy, a new and foreign meaning so as to render the contract when so enlarged invalid as against public policy, to the end that the law would then strike down the contract when so enlarged, affording defendants a means of escape from liability. This evidence was properly rejected, and the same may be said of the rulings on the other rejected evidence.

The jury passed on the evidence, and its verdict was approved by the trial court. To our minds the verdict was right.

The cause should be affirmed.

By the court: It is so ordered.

KING v. HUDSON RIVER REALTY CO.

210 N. Y. 467. (1914)

CHASE, J. This action is brought to recover damages for the alleged breach of a covenant contained in a written contract dated May 9, 1906, by which the plaintiff agreed to purchase and the defendant to sell certain lots in Bergen county, New Jersey, as shown on a map described in the contract. The covenant is as follows:

"As part of the consideration for the said purchase price this company hereby agrees to build proper streets and sidewalks as shown on said map on which these lots abut, and put in a sewer."

The plaintiff performed the contract on his part. The covenant was not performed by the defendant in 1906. It claims to have performed the covenant in 1907 and prior to September 1 of that year. It did in 1907 build streets and sidewalks abutting said lots and constructed a sewer in said streets. It is claimed by the plaintiff that the streets and sidewalks were in accordance with the covenant.

The plaintiff was allowed to testify that some time before the written contract was made, a sales agent of the defendant told him that if

he would purchase the lots the defendant would put in improvements the same as had been done on sections of land north of the sections in which the lots were situated, "putting the streets on to grade, the sewers, sidewalks, gutters, water and gas, etc., all the improvements," and that, "he would try and have the improvements completed within about six weeks." This testimony was admitted notwithstanding the defendant objected to the same as "incompetent, irrelevant and immaterial, the contract being in writing." The objection was overruled and the defendant excepted. It was error to allow such testimony, as the agreements prior to the written contract were merged in it.

The judgment should be reversed and a new trial granted, with costs to abide the event.

WENTWORTH v. MANHATTAN MARKET CO.

216 Mass. 374. (1913-14)

DE COURCY, J. This is a bill in equity seeking, among other things, to have the defendants ordered to specifically perform their agreement under a lease and written contract by erecting a building upon the leased premises, and by conveying in fee a certain right of way; and also asking that they be enjoined from maintaining a stable on the leased premises. It is before this court on an appeal by the defendants from an interlocutory decree overruling exceptions to and confirming a master's report, and from the final decree.

The facts out of which the controversy arises are as follows: The defendant occupied for market purposes a building in Cambridge, the lease of which was about to expire. It leased from the plaintiff for ten years from May 9, 1910, with the privilege of renewal, a lot of land containing about six thousand five hundred square feet, located in the rear of property known as Hyde's block, that belonged to one Corcoran. There was on the leased land a three-story wooden building thirty by sixty feet in size, the ground floor of which long had been used by the plaintiffs as a stable before the erection of his four-story tenement block. The parties also executed a collateral contract in writing, later referred to. The principal controversy in this litigation relates to the size and character of the new building that the defendant was to erect on the leased premises within two years from June 1, 1910.

Exceptions 3, 4 and 6 are to the admission of conversations between the parties, before the execution of the lease and contract, relating to the building proposed to be erected on the plaintiff's land and to the use of the stable. In view of the fact that the papers were prepared by a skilled attorney, after many interviews and preliminary drafts, that according to the uncontradicted testimony they expressed the final conclusions of the parties and that the contract on its face is reasonably plain, it is not clear on what ground this testimony was admitted. Even assuming the terms of the instrument in which the previous oral negotiations were merged to be doubtful, the evidence admissible to clear up the doubt would be that of the circumstances attending the transaction, and not the conversations held in the course of the preliminary negotiations. It is apparent from a perusal of these that their natural tendency and probable effect upon the master was to vary by oral evidence the written agreement between the parties; and these exceptions must be sustained. Jennings v. Puffer, 203 Mass. 534; Rochester Tumbler Works v. Mitchell Woodbury Co., 215 Mass. 194.

BOLLINGER v. GALLAGHER

170 Pa. 84. (1895)

Trespass for alleged wrongful levy and sale of a mule, horse, saddle and two bridles, claimed by plaintiff as her property.

Verdict and judgment for plaintiff for $450. Defendants appealed.

Opinion by MR. JUSTICE WILLIAMS, July 18, 1895:

One other subject requires attention. It is brought to our notice by the eleventh assignment of error. Millard F. Taylor, a member of the Baltimore bar, was called as a witness and testified that he was familiar with the law of Maryland relating to husband and wife. He was not then examined as to what the law was held to be by the courts of that state on any subject relating to husband and wife, but was informed by counsel that it was his purpose to put a hypothetical question to him. Before this question was framed an offer was required and it was accordingly reduced to form thus: "Defendants propose to prove by the witness that if a wife of an insolvent debtor in Maryland who purchased property while the husband was in insolvent circumstances, giving in payment therefor her promissory note signed by herself and her husband as joint makers, and two sureties, such a

purchase would not be so exclusively on the wife's credit as to give title to the property as against the husband's creditors under the Maryland law."

It should be noticed that this is not an offer to prove what the law of Maryland is as held by its courts, but an offer to show by the witness what, upon the facts assumed in the hypothetical question, his own conclusion is as to what would be held by the courts of that state. The question reached after the opinion of the witness as to what the courts would hold, not after his knowledge of what they had held. The statutes of another state or country may be proved by a properly authenticated copy. The unwritten law of such state or country may be shown by the decisions of the courts or by the testimony of a witness who is familiar with it: 1 Greenleaf on Ev. 488; Chesapeake Ins. Co. v. Starke, 6 Cranch, 273; but such evidence is to the court, and for its information. The jury must take the law from the court. The law of another state upon a subject coming under notice in the trial of a cause will be presumed to be the same as the law of this state upon the same subject. It is incumbent upon him who alleges that it is different to show just what it is to the court, who will judge of the sufficiency of the evidence, and its effect, and instruct the jury thereon. Ordinarily expert testimony is for the jury and is intended to aid them in determining a question of fact. They are not bound by it, but may exercise their own judgment in deciding the question in regard to which experts have testified, 7 Am. & Eng. Ency. of Law, 516, and may in doing so disregard the expert testimony. But the proof of the laws of another state is not made by experts as such. It is made by the best evidence which the nature of the law in question admits of. A statute admits of exact proof by a copy and for this reason it cannot be shown by parol. The expositions of that statute by the courts are not necessarily evidenced by any sort of documentary matter and for this reason may be proved by one who is familiar with them; but a conjecture, or a professional opinion, as to what the law would be held to be upon certain assumed facts, while it might be desirable for the guidance of a client, and be within the appropriate province of an attorney at law to give, is not admissible as proof of what the law actually is. With the statute before him the judge in the absence of an interpretation by the courts of the proper state must make his own. He must determine its meaning and its operation for himself, and unless he seeks or accepts the services of an *amicus curiæ*, the opinions of other men are not admissible as evidence at the in-

stance of either party. It was not error therefore to reject the offer resting on the hypothetical question.

Upon a consideration of the whole case the assignments of error are overruled and the

Judgment is affirmed.

MIDLAND ROOFING MFG. CO. v. PICKENS.

96 S. C. 286. (1913)

The opinion of the court was delivered by MR. JUSTICE FRASER. The plaintiff in its complaint: "That on or about the 18th day of March, nineteen hundred and ten, plaintiff sold and delivered to the defendant, on account, at his request, goods, wares and merchandise to the value of four hundred and seventy-three dollars, an itemized, verified copy of which account is hereto attached, marked Exhibit A, and made part of this complaint.

That the said goods, wares and merchandise were reasonably worth the money therein charged for them, and no part thereof has been paid except the sum of one hundred twenty-two and 82-100 dollars, paid as freight charges thereon, as plaintiff is informed and believes, and there is now justly due and owing to plaintiff from defendant the sum of three hundred and fifty and 18-100 dollars."

For the first defense, the defendant alleges that the goods mentioned in the complaint were delivered by the plaintiff to and received by the defendant upon a special contract betwen them, whereby plaintiff's salesman entered into agreement with defendant on or about the 18th day of March, 1910, to take on consignment one-half car of roofing. This the defendant was to sell for plaintiff and every thirty days remit proceeds of said sales, less defendant's commissions. Said goods were received on or about the 6th day of April, 1910, before any part of said goods were sold and before the time specified in the agreement for the defendant to perform his part thereof, defendant's storehouse was destroyed by fire, and not by any fault or negligence of defendant, said roofing was destroyed. That the title of said goods was never in the defendant, but in the plaintiff."

The plaintiff offered in evidence a written order signed by the defendant. The defendant offered evidence to show that on the day the order was signed and before the agent had delivered it to the plaintiff

for acceptance, he had notified the agent that he withdrew the order and that then and there he made a new parol agreement by which the plaintiff was to ship the goods to the defendant upon consignment. The goods were destroyed by fire before any part was sold. The defendant's evidence was entirely by parol. The plaintiff objected to the evidence on the ground: 1st, that parol evidence cannot be admitted to vary a written contract; 2nd, that inasmuch as the defendant had alleged a special contract, that is a contract by specialty, he could not prove a parol contract.

The general rule is correctly stated that a written contract can not be varied by parol; but here the defendant denied that the writing ever became a contract. Until the writing was signed or acted upon that is accepted by the plaintiff, it was a mere offer and could be withdrawn. There was no evidence on behalf of the plaintiff to deny the allegations of the answer. The first ground of objection can not be sustained.

Judgment affirmed.

PUTNAM FOUNDRY & MACHINE CO. v. CANFIELD.

25 R. I. 548. (1904)

Trespass on the case in assumpsit. Heard on petition of defendant for a new trial, and petition denied.

TILLINGHAST, J. The defendant petitions for a new trial on the grounds (1) that the verdict is against the evidence; and (2) that the presiding justice erred in allowing the plaintiff to introduce parol evidence to vary a written contract.

1. An examination of the evidence submitted fails to satisfy us that it is not sufficient to sustain the verdict.

2. The written contract between the parties, which was entered into on March 25, 1903, was for the furnishing and installing by the plaintiff of a steam-heating and drying apparatus in the defendant's factory in Providence, and the contract stipulated, amongst other things, that "the price for same, complete, will be eight hundred fifty (850) dollars."

The contract fixes no time within which the work called for shall be done, nor does its terms specify when the price agreed upon shall be paid.

At the trial of the case the plaintiff was allowed to offer testimony, against the defendant's objection, that on April 2, 1903, the defendant requested the plaintiff to change the terms of payment so that he might pay the sum of $500 on the 10th of April, 1903, and the balance on the 10th of May. The reason given by the defendant for desiring this change, according to the plaintiff's testimony, was, in effect, that it would be more convenient for him to pay the amount agreed on in two installments than to wait until the work should be completed and then pay the entire amount.

The defendant denies that any such conversation as that testified to by the plaintiff was had, or that any modification whatever was made regarding said written contract.

This raised an issue of fact for the jury to determine; and there was sufficient evidence offered by the plaintiff to warrant them in finding that the time of payment was modified, as aforesaid. The only question for us to determine is whether the testimony which was offered by the plaintiff was admissible, as ruled by the trial court.

We think it was. The contract, as already suggested, contains no stipulation as to when the work called for shall be paid (although it is doubtless true that under said contract it would be due and payable upon the completion of the work), and hence the evidence which the plaintiff was permitted to introduce was not inconsistent with, and did not tend to contradict, the written contract. Its only effect was to fix a different time of payment from that which the law would have fixed, or rather the time would have been implied by law, in the absence of any special agreement. Nor was the evidence offered in violation of the familiar rule invoked by the defendant's counsel, viz.: that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," for the evidence was not of a contemporaneous agreement, but related to an agreement made several days subsequent to the date of the written contract in question. In short, the oral evidence offered related to a supplemental agreement as to the time or times of payment for the work called for by the written contract, and hence in no event was it obnoxious to the rule of evidence above stated.

Petition for new trial denied, and case remanded for judgment on the verdict.

CRELIER v. MACKEY.

243 Penn. 363. (1914)

Assumpsit on written contract. Before EVANS, J.

The contract was as follows:

"Thomas R. Mackey Baking Company,
"Pittsburgh, Pa., Feb. 23d, 1905.

"An agreement between Chas. F. Crelier and Thomas R. Mackey, President of the Thomas R. Mackey Baking Co., in consideration of getting the dividends on $10,000 worth of common stock when dividends are declared, and a salary of $200 per month.

"I hereby bind myself to accept the position as foreman of the Thomas R. Mackey Baking Company for five (5) years, and agree to report for duty not later than August 1st, 1905, Mr. Mackey agreeing to protect me to the extent of $1400 on my twenty-five (25) shares of Ward-Mackey Company's common stock.

"Mr. Mackey further agrees to pay Mr. Crelier in cash the sum of $1400 in five (5) years from the above date.

"(Signed) Chas. F. Crelier.
"Thos. R. Mackey."

"Witnessed,
"M. Fagan."

Opinion by MR. JUSTICE BROWN, January 5, 1914:

Though the agreement in this case was written on a letterhead of the Thomas R. Mackey Baking Company, and Thomas R. Mackey, the appellant, is therein described as president of that company, it is not a contract between the said company and the appellee, nor is there anything in it showing an intention of the parties to it that Crelier, the appellee, should look to the company for payment of the sum for which he sues. Mackey, as an individual, agreed, without condition, in a separate clause of the contract, that he would pay the appellee $1,400 five years from August 1, 1905, and to the agreement he appended his individual signature, without adding anything thereto to indicate that he did not intend to be personally bound. As the agreement is free from all ambiguity, it was for the court to construe it, and it was properly construed to be the personal obligation of the appellant.

The disallowed offer, which is the subject of the first assignment of error, was to show that the agreement was not what it clearly purported to be, but that the appellant had executed it as the mere repre-

sentative of the Thomas R. Mackey Baking Company, and that this fact was known to the appellee at the time it was executed.

Opinion of the court.

If the offer had been allowed, permission would have been given the defendant to vary and contradict the terms of a plain contract and to substitute for it another, upon which the appellee would have no cause of action against the appellant. With no averment in the affidavit of defense, and with no offer on the trial to prove that there had been any fraud, accident or mistake in the execution of the agreement, its plain terms were not to be radically changed by parol: Hunter v. McHose, 100 Pa. 38; Wodock v. Robinson, 148 Pa. 503; Krueger v. Nicola, 205 Pa. 38; Lowry v. Roy, 238 Pa. 9. The meaning of the parties to the agreement is conclusively presumed to have been set forth in its written words, and, as they speak for themselves, their meaning was for the trial judge.

Judgment affirmed.

J. J. CRABLE & SON v. O'CONNOR.

21 Wyo. 460. (1913)

POTTER, Justice.

The defendant in error was plaintiff in the court below and brought this action against J. J. Crable, E. I. Crable and J. J. Crable & Son, plaintiffs in error here, to recover a sum of money alleged to be due as rent for certain teams delivered to J. J. Crable & Son by the plaintiff pursuant to a written contract set out in the petition as follows:

Parol evidence was admitted, over the objection of the defendants, to sustain the averments of the petition to the effect that in making the contract with the plaintiff for the lease of the term E. I. Crable acted, as a member to and for the firm of J. J. Crable & Son, and it was in fact a partnership contract. It is contended that this ruling was error for the reason that it violated the principle that parol evidence is inadmissible to vary or contradict the terms of a written instrument.

The law is well settled, both in England and this country, that it is competent to show by parol evidence that a party who is named in and has signed a contract as one of the parties thereto was an agent for another, and acted as such agent in making the contract, so as to give

the benefit of the contract to, and charge with liability, the unnamed principal; and this is so, whether the unnamed principal was disclosed or known to the other party to the contract at the time it was made or not, although there is occasional opinion to the contrary where the unnamed principal was known to the other party at the time. (Higgins v. Senior, 8 M. & W. 834; Jones on Ev., (2nd Ed. 1 Sec. 452; 9 Ency. of Ev., 404-405; Story on Agency, (7th Ed.) Sec. 270; 4 Wigmore on Ev., Sec. 2438; Curran v. Holland, 141 Cal. 437, 75 Pac. 46; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314.) It is said in Story on Agency:

"There is no doubt that parol evidence is admissible, on behalf of one of the contracting parties, to show that the other was an agent only in the sale, although contracting in his own name, so as to fix the real principal. It has been well observed that, in cases of this sort, the liability of the principal depends upon the act done; and not merely upon the form in which it is executed. If the agent is clothed with the proper authority, his acts bind the principal, although executed in his own name. The only difference is that, where the agent contracts in his own name, he adds his own personal responsibility to that of the principal, who has employed him."

It is contended that the conversations at the time the contract was made were inadmissible, on the ground that agency on the authority of an agent cannot be proved by the declarations of the alleged agent. But it was competent to prove the transaction, to ascertain whether E. I. Crable acted for the firm or on his own behalf. Whether there was a firm, and whether E. I. Crable had authority to act for it, "would, perhaps", as said in the Michigan case of Beckwith v. Mace, *supra*, "affect the validity of his attempt to bind others, but the evidence offered was admissible to show the nature of the contract actually agreed upon.' In that case the evidence had been excluded, and for that reason the judgment was reversed. Here the evidence was admitted, and properly so, for it explained the transaction and tended to show that the contract was made for the partnership. The fact of the partnership was shown by other evidence, and this contract was such as to come clearly within the partner's authority.

As above indicated, we think the evidence sufficient to justify the trial court in finding that E. I. Crable, in making the contract for the use of the teams, was acting for the firm of which he was a member, that it was a partnership contract, and created a firm obligation. The amount of the judgment indicates that the plaintiff was only allowed

the rent of the teams, with interest, after deducting the credit given for the hay.

For the reason stated, the judgment will be affirmed.

SCOTT, C. J., and BEARD, J., concur.

COHEE et al. v. TURNER & WIGGINS.

37 Okla. 778. (1913)

Action by Turner & Wiggins against Charles Cohee and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Opinion by BREWER, C. In January, 1906, the plaintiffs in error entered into a written contract of employment with Turner & Wiggins, a firm of lawyers, by which said firm was employed to represent the interests and claims of a class of colored people in the Choctaw and Chichasaw Nations usually called "Freedmen", before Congress and its committees and the various departments of the federal government, in the protection of their rights and in the advancement of their claims and interests relative to enrollment of themselves and their newborn babies, and as to their rights and claims of right in the lands and properties of said tribes. This suit was brought on said contract, and a judgment obtained by said firm of lawyers from which the defendants below, as the plaintiffs in error here, have appealed.

A number of questions are raised in the record, but two of which are seriously urged in the brief; the others appearing to have been abandoned. These questions are: (1) That the court erred in refusing to permit the defendants to testify that they signed the contract in their representative capacity only and did not intend to be bound individually thereby. (2) That the court abused its discretion in refusing to permit the defendants to amend their answer in the course of the trial as to material matters.

1. On the first proposition as stated above, it is contended that, although the contract in suit is in writing and its execution admitted in the pleading, yet that it is so framed as to be ambiguous as to the capacity, whether representative or individual, in which the makers signed it. The contract recites:

"Now therefore, we Charles Cohee, Robert Cobb, Ed. Humdy, etc., constituting the executive committee and the duly authorized and empowered members and claimants in this behalf, and for themselves and

those whom they represent as such claimants in the premises, do hereby as such, warrant and guarantee to said Turner & Wiggins, that in the event of diligent performance of duty, they shall receive as compensation for services under this contract, the sum of one dollar per capita aforesaid, to be paid by the said parties of the first part."

It seems to be well settled both in this and many other jurisdictions that when the question arises, in a suit on a written obligation, as to whether the signers executed the same appears on the face of the instrument which suggests a doubt or ambiguity as to the party or as individual, and anything or ambiguity as to the party bound, or as to the character in which the signers acted—parol testimony is competent as between the original parties, for the purpose of showing their true intent in the execution of the instrument. Weagant v. Camden et al., *ante*, 132 Pac. 487; Farmers' & M. Bank v. Hoyt, 29 Okla. 772, 120 Pac. 264; Janes v. Citizens' Bank, 9 Okla. 546, 60 Pac. 290; Miller v. Way, 5 S. D. 468, 59 N. W. 467; Case Mfg. Co. v. Soxman, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019. The list of authorities on this point might be extended indefinitely.

Such parol evidence is not admitted for, nor does it have the effect of, contradicting or varying the language of the written agreement, but it is admitted to explain away the doubt inhering in the written language itself.

But is the contract in suit ambiguous or uncertain as to who is to be bound, or as to the character in which the signers executed the same? The claim is made that the defendants excuted it "as members of the executive committee of the Choctaw & Chichasaw Freedman's Association, and in no other capacity." This contention does not appear sound. If we analyze the language, we find these guarantors saying "now therefore we (following with the twelve individual names) constituting the executive committee, etc. * * * and for themselves, and those they represent, etc., warrant and guarantee * * * the payment of the compensation in the contract." If this association had any legal existence, and these men had authority to bind it, they did so. But it is further clear that they went further than this, and, by the very letter of the bond, bound themselves, as individuals, in specific language, in addition to attempting to bind the so-called association and the members thereof. Bad grammar does not necessarily render the meaning of a writing ambiguous or doubtful.

The cause should be affirmed.

By the court: It is so ordered.

UNITED SURETY CO. v. MEENAN.

211 N. Y. 39. (1914)

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 8, 1912, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

June 15th, 1909, the Gore-Meenan Company, of which Frank E. Gore was president, and the defendant Daniel Meenan was secretary, together with the respondent, executed a bond to Benjamin B. Odell, Jr., and William E. Paine, as receivers of the Thomas McNally Company, in the sum of one hundred thousand dollars, which recited that the Gore-Meehan Company had entered into a contract with said receivers, bearing date the 15th day of June, 1909, whereby said company had been employed by said receivers to construct part of the Catskill aqueduct between Garrison and Peekskill, as shown on the contract drawing for contract number two between the McNally Company and the city of New York. The condition of the obligation was that the Gore-Meenan Company should faithfully perform the contract and pay bills for labor performed and materials furnished. This bond was executed by the Gore & Meenan Company by Gore as president.

HOGAN, J. The sole question to be determined on this appeal is the correctness of the rulings made by the trial justice in the exclusion of evidence offered on the behalf of defendant to avoid liability upon the instrument in suit and to establish that the writing in question was the undertaking of the Gore-Meenan Company, of which defendant was secretary, and was not the individual obligation of the defendant; that the plaintiff obligee in the bond understood that the instrument in suit was the undertaking of the corporation, not only from the face of the same but it treated it as such by subsequently preparing an indemnity bond and seeking to have Meenan individually execute the same in lieu of the bond in suit. For the purpose of establishing the acts and knowledge of plaintiff, defendant called as a witness a representative of the plaintiff, and propounded questions to him tending to disclose knowledge on the part of the plaintiff that the bond was intended by plaintiff to be the bond of the Gore-Meenan Company; that it had been treated as such by the plaintiff, and that an attempt had been made by the plaintiff after the execution of the instrument in question to secure from the defendant individual indemnity in addition to the

Gore-Meenan liability. All parol evidence offered by defendant along the line stated was excluded over exceptions by defendant.

If upon the face of the instrument in suit such ambiguity is found as to be consistent with the construction either that the defendant intended to execute the same on behalf of the Gore-Meenan Company or as an individual, parol evidence was admissible to prove the circumstances under which the bond was executed and the character in which the defendant signed the same.

The bond in its entirety, including the acknowledgment of the same, was set forth in the complaint in the action, and was received in evidence upon trial. It was prepared by the plaintiff and under well-established rules of law must be strictly construed against it. The body of the bond does not contain the name of the defendant. True it does refer to the parties thereto in an individual sense, but it also refers to "successors", thus disclosing the adaptability of the blank form to execution by a corporation as well as an individual. At the close of the instrument will be found first the corporate seal of the Gore-Meenan Company; this was followed by the signature of the defendant Meenan and the signature of Gore. The acknowledgment was by Gore, "President of the Gore-Meenan Co."; then follows the acknowledgment wherein appears the name of Meenan who did depose that he was secretary of the Gore-Meenan Company," the corporation described in and which executed the foregoing instrument; that he knows the seal affixed to the said instrument is such corporation seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order."

The instrument upon the face thereof discloses it was executed the day following the execution by the Gore-Meenan Company of an application (which was placed in evidence by the plaintiff) for a bond substantially in terms the language of the bond in suit.

At common law a contract under seal of a corporation, attested by the signature of its executive officers, was *prima facie* the contract of the corporation. The seal of the corporation was its signature. (Trustees v. Mckechnie, 90 N. Y. 618; People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512-525; Quackenboss v. G. & R. F. Ins. Co., 177 N. Y. 71.). The seal of the corporation having been affixed to the instrument followed by the signatures of the president and secretary, designated in the acknowledgment as such, the presumption follows that the seal of the corporation was attached to the instrument by proper authority.

We are of the opinion that the instrument in suit was not free from ambiguity, and that parol evidence was admissible to prove the circumstances under which the same was executed, also to establish facts disclosing knowledge of the plaintiff that the purpose of the bond in suit was to bind the Gore-Meenan Company and not the defendant in the suit (Schmitter v. Simon, 114 N. Y. 176); therefore, the trial justice was in error in refusing to receive such evidence and for that reason judgment must be reversed.

The judgment should be reversed and a new trial ordered, costs to abide the event.

WILLARD BARTLETT, Ch. J., WERNER, COLLIN and CUDDEBACK, JJ., concur; HISCOCK, J., dissenting; MILLER, J., not sitting.

Judgment reversed, etc.

BARBRE v. GOODALE.

28 Or. 465. (1896)

This is an action by J. I. Barbre against J. C. Goodale to recover upon two separate causes. The first is upon a written agreement which purports upon its face to be the agreement of one G. W. Handsaker, of the first part, and J. C. Goodale, of the second part. By its terms, in brief, the first party agrees to cut, haul, bank, and deliver to the second party two million feet of fir logs, and, if certain conditions of the lumber market continued to prevail, an additional one-half million feet, at a certain point upon the McKenzie River in Lane County, at the rate of three dollars per thousand, to be paid by the second party as follows: One dollar per thousand when the logs were cut and banked, and one dollar per thousand when scaled and rolled in the river, and such balance as should be found due between the parties within thirty-one days thereafter.

The second cause of action is based upon the sale and delivery by the plaintiff to defendant of nine hundred and eighty-seven thousand feet of other logs at three dollars and twenty-five cents per thousand, upon which a balance of four hundred and seventy-two dollars and thirty-four cents is claimed. At the trial plaintiff had a verdict for two hundred and seventy-two dollars, and from the judgment thereon the defendant appealed. Affirmed.

Opinion by MR. JUSTICE WOLVERTON:

The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question among American authorities—the one affirming and the other denying; but the case is one of the first impression here, and we feel constrained to adopt the rule which may seem the more compatible with the promotion of justice, and the exaction of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction; for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract, but find support upon the doctrine of estoppel, it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility, and is therefore estopped to proceed against the principal. The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presumption thus created is a disputable one, and that the intentions of the party must be gathered from his words, and the various circumstances which surround the transaction, as its practical effect is to promote justice and fair dealing. The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt had his election as to whether he will hold him or the principal responsible. This doctrine

must be limited to simple contracts, and may not be extended to negotiable instruments and specialties under seal, as they constitute an exception to the rule.

If any instrument is valid without a seal, although executed under seal, it is to be treated as written evidence of a simple contract; and the seal adds nothing, except, under our statute, it is made primary evidence of a consideration: Stowell v. Eldred, 39 Wis. 626; Byington v. Simpson, 134 Mass. 169 (45 Am. Rep. 314); Rector of St. David's v. Wood, 24 Or. 404 (34 Pac. 18).

Now, looking to the contract which is the basis of the cause of action under consideration, we find that it was executed in manner and form as requested by the defendant, and to subserve a special purpose peculiar to his interest, with the express avowal that it should be treated as the contract of plaintiff, although executed in the name of Handsaker the agent. It is further disclosed that both the defendant and the plaintiff afterwards so treated it; the plaintiff proceeding under it, and in obedience with the terms and conditions thereof in cutting, hauling, and banking the logs preparatory to delivery, and the defendant by making payments to him from time to time, sometimes directly, and sometimes through Handsaker, the agent. This ratification, constitutes a very significant feature of the inquiry. Aside from this, the contract discloses upon its face that a part of the consideration for these logs moved directly from the defendant to plaintiff. Under these attendant circumstances, and others which might be alluded to, we think the court committed no error in admitting the testimony to show who were the real parties to the contract, as well as to explain how the clause touching the one thousand seven hundred dollars came to be placed therein. The admission of the parol evidence touching this clause may be upheld as being explanatory of the consideration which in part supports the contract.

Affirmed.

DECOWSKI v. GRABARSKI.

181 Ill. App. 279. (1913)

Statement by the court. Plaintiffs in error, hereinafter called defendants, are seeking in this court a reversal of a judgment obtained against them by Peter Decowski, hereinafter called plaintiff, on a *cognovit* under a power of attorney contained in a promissory note.

Defendants entered an appearance and filed an affidavit, whereupon leave was given to make a defense, and judgment to stand as security and the affidavit to stand as an affidavit of merits. A trial was had by the court, which found for the plaintiff and entered judgment against the defendants by confession.

The note in question is in part as follows:

"$83.34. Chicago, Ill., May 1, 1910.

Two years after date for value received we promise to pay to P. Decowski or order Eighty-three and 34/100 Dollars at our office, 1112-1114 Milwaukee Ave.

Witness hand the day and year first above written.

In presence of

Albert F. Grabarski, Pres.
F. J. Tomczak, Secy.

No.....Due May 1, 1912."

By the affidavit of merits it was claimed, in substance, that the note was executed by the defendants as president and secretary, respectively, of a corporation called "The Bell", and that the note was the obligation of The Bell and not of the defendants individually; that no consideration had ever been received by them, as individuals for the execution of the note; that in 1908 The Bell assessed its stockholders, among whom was the plaintiff; that said assessment was a loan by the stockholders to the corporation, and that the corporation evidenced its indebtedness to the plaintiff for the amount loaned by him to the corporation by giving him its promissory note for $83.34 due two years after date; that subsequently said corporation changed its officers, and the defendant Grabarski became its president, and the defendant Tomczak, its secretary; that thereafter, upon the maturity of the aforesaid note, the defendants, acting for the corporation as president and secretary, respectively, executed and delivered to plaintiff a new note in place of the old one, upon which new note the judgment herein was entered, but which note was not the individual indebtedness of the defendants but was executed and delivered as the indebtedness of the corporation.

MR. JUSTICE MCSURELY delivered the opinion of the court.

The question for our determination is whether or not the defendants, individually, are obligated by the note in question. From an examination of the record we find that the word "we" appearing in the note was inserted after its maturity, but by whom is not shown. However, we do not deem this to be important. The use of the word "we" in this connection indicates nothing as to whether the note was intended

to be the obligation of the individuals or of the corporation. New Market Sav. Bank v. Gillet, 100 Ill. 254.

Examination of the decisions in the reported cases cited by respective counsel does not give definite assistance in arriving at the conclusion upon the issue before us.

It was said in Scanlan v. Keith, 102 Ill. 634 (641):

The possible task of reconciling the decisions on this branch of the law will not be attempted, nor would it subserve any good purpose to review any considerable number of cases in other courts on this subject. They will be found to be conflicting as the cases are numerous. Much of the contrariety observed in the decisions, both in the American States and in England, no doubt arises out of the equities of each case, and of an effort on the part of courts to carry out what was supposed to be the intentions of the parties executing such notes or bills."

However, it seems to be fairly settled by the decisions in this state that a party will not be permitted to show by oral testimony that his written agreement, understandingly entered into, was not in fact to be binding upon him. And so it has been held in Hypes v. Griffin, 89 Ill. 134, and in Powers v. Briggs, 79 Ill. 493; that where the trustees of a church corporation made a note in their individual names, although they were described as trustees, parol evidence was inadmissible to show that it was the intention to make an indebtedness of the church corporation. But there is also another principle that where a party signs his name as the agent or officer of a corporation in the ordinary course of business, if it appears that it is the obligation of the corporation the officer is not personally liable, and that the facts may be shown by extrinsic evidence.

As was said in Scanlan v. Keith, *supra*:

"Most generally there is that on the face of the instrument itself, * * * that indicates unmistakably it is the obligation of the corporation. It is seldom any one takes such paper under the belief it is the obligation of the officers executing it on the behalf of the corporation. But parol testimony is admissible to establish the facts, collateral though they may sometimes be, that will make it appear past all doubt whose obligation it is."

In Keidan v. Winegar, 95 Mich. Rep., the court discusses the general propositions in such apt words that we quote from the opinion at some length:

"As is so often said, it is the intent of the parties which is to be carried out by the court. The rule that rejects words added to the signature is an arbitrary one. Its reason is not so much that the words

are not, or may not be, suggestive, but that they are but suggestive, and the instrument, as a whole, is not sufficiently complete to point to other parentage. The very suggestiveness of these added words has given rise to an irreconcilable confusion in the authorities as to the legal effect of such an instrument. Extrinsic evidence, therefore, is admissible in such case, betwen the immediate parties, to explain a suggestion contained on the face of the instrument, and to carry out the contract actually entered into as suggested, but not fully shown, by the note itself. The presumption that persons dealing with negotiable instruments take them on credit of the parties whose names appear should not be absolute in favor of the immediate payee, from whom the consideration passed, who must be deemed to have known all the facts and circumstances surrounding the inspection of the note, and with such knowledge accepted a note containing such a suggestion."

Applying these general statements to the particular case before us, it may be said that while plaintiff, by the introduction of the note, made a *prima facie* case against the defendants individually, yet the court properly permitted the defendants to introduce evidence outside the note to prove the matters of defense set forth in their affidavit of merits.

Reversed and remanded on this ground.

STANLEY v. FIREMAN'S INSURANCE COMPANY

34 R. I. 491. (1912)

VINCENT, J. This is an action of assumpsit brought to recover the amount due under a policy of insurance issued by the defendant company to the plaintiff. The case is now before the court on exceptions to the decision of the Superior Court sustaining the defendant's demurrer to the plaintiff's second amended declaration.

The policy in question was issued to the plaintiff in his individual name, although he now alleges that it was, in fact, procured for the benefit of himself as administrator and of Roger R. Ramsey, the sole heir-at-law of Sarah E. Stanley.

The plaintiff further alleges that the agent of the defendant who negotiated the contract of insurance and wrote the policy knew that said policy was intended to cover, and agreed that it should cover, the

plaintiff's interest as administrator and also the interest of the heir-at-law.

The plaintiff contends that he is entitled to offer parol testimony in support of these allegations and that upon sufficient proof of the alleged agreement and understanding, between himself and of the defendant's agent, he would have the right to recover for the loss which he has sustained as administrator and also for the loss sustained by the heir-at-law, notwithstanding the fact that the written instrument, by its terms covers nothing more than the individual interest of the plaintiff. There can be no doubt that if it had been indicated in the policy that the same was issued for the benefit of the plaintiff as administrator and of Roger R. Ramsey, or even if the policy had contained some language indicating or suggesting other and distinct interests, that parol testimony might properly be offered to show who the parties were as well as the extent of their interest.

The general rule is that a policy made in the name of a particular person will not protect the interest of any other person, unless it contains some words which indicates that it is intended that the interest of some other person be covered. Colley's Briefs on the law of Ins., Vol. 1, p. 787, and cases cited.

In Higginson v. Dall, 13 Mass. 96, the court in its opinion said, "the policy itself is considered to be the contract between the parties and whatever proposals are made, or conversations had between the parties prior to the subscription, they are to be considered as waived if not inserted in the policy, or contained in a memorandum annexed to it."

In Insurance Co. v. Lyman, 15 Wall. 664, Mr. Justice Miller said, "Undoubtedly a valid verbal contract for insurance may be made, and when made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved, * * * as in all other cases when contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contracts, and must have the same effect in excluding parol testimony in its application to it that other written instruments have. * * * To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterwards, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law. The doctrine is too well settled

that all previous negotiations and statements are merged and included in the assent to the written instruments as expressing the agreement."

Many other authorities recognized, to the same effect, might be cited were it necessary to do so.

Numerous authorities recognize the admissibility of parol testimony in explanation of the written instrument, when its terms are incomplete or ambiguous, as for instance, where the insurance is effected and the policy issued "for whom it may concern," or for the "owners" of a vessel or cargo, parol testimony may be offered to show who the parties in interest, or the owners, are. But none of the cases cited upon the plaintiff's brief support his contention. None of them go to the extent of holding that a person who is not named in the policy and whose existence is not even suggested therein can, through the aid of parol testimony, make himself a party to the contract and obtain the benefits of its provisions.

We think that the introduction of parol testimony, in accordance with the plaintiff's contention, showing circumstances and verbal understandings and agreements, between the plaintiff and defendant's agent, prior to the execution and delivery of the policy, would in effect be founding a right of action on a parol variation of a written contract and would be an attempt to reform a written contract in an action at law, which under the great weight of authority he cannot be permitted to do. If the plaintiff desires to reform his contract he must do so through a court of equity and not in an action at law.

The plaintiff's exceptions are overruled, and the case is remitted to the Superior Court for further proceedings not inconsistent with this opinion.

TOWN v. JEPSON.

133 Mich. 673. (1903)

Assumpsit by Lewis S. Town against Merton K. Jepson and Edward Jepson copartners as Jepson Bros., for a breach of contract for the sale of fruit. From a judgment for defendants, plaintiff brings error. Affirmed.

CARPENTER, J. On the 28th of September, 1898, the parties to this suit entered into a written contract.

Plaintiff contends that the court erred in permitting defendants to

prove that, after the contract was entered into, it was agreed that shipments of 100 fifty-pound boxes might be made by them. This testimony was clearly admissible. See Summers v. Wagner, 87 Mich. 272 (49 N. W. 570); Freese v. Arnold, 99 Mich. 13 (57 N. W. 1038).

Neither can we agree with plaintiff that parol testimony showing the agreement that the draft should be paid at Manchester was incompetent. This evidence did not tend to vary the contract. The contract contained these, and only these, terms: "Sight draft, with bill of lading attached." It was not only competent, but proper, for the parties to determine by an oral agreement upon whom these drafts should be drawn, and where they should be presented. Liggett Spring & Axle Cp. v. Michigan Buggy Co., 106 Mich. 445 (64 N. W. 466); National Cash Register Co. v. Blumenthal, 85 Mich. 464 (48 N. W. 622).

The judgment will be affirmed, with costs.

The other Justices concurred.

BONICAMP v. STARBUCK.

25 Okla. 483. (1910)

Action by W. H. Starbuck against John Bonicamp. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

TURNER, J. On May 2, 1910, W. H. Starbuck, defendant in error, sued John Bonicamp, plaintiff in error, in the Probate Court of Kay County in damages for the alleged breach of a lease, dated November 1, 1905, wherein the latter undertook to lease to the former for a period of five years from date a two story building of certain dimensions located in Blackwell, Okla., "at a monthly rent of $70 per month, said sum to be increased at the rate of 15% of the sum expected by the first party for purchase price and improvements in excess of the sum of $4,550; first party to make all necessary improvements and repairs to put property in first-class condition to be occupied as a first-class hotel. Parties to this contract to agree on the improvements necessary thereof." After answer admitting the execution of the lease and a general denial and reply thereto filed, there was trial by a jury, which resulted in a judgment for plaintiff for $817.50, and on second trial for $640, and after motion for a new trial filed and over-

ruled, to which defendant excepted he brings the case here for review by petition in error and case made.

To maintain the issues on his part, plaintiff, among other things, introduced in evidence the lease providing as aforesaid, proved that defendant had refused him possession thereunder and had leased the premises to another, and, pursuant to allegations in his petition over the objection of defendant, was permitted to introduce parol testimony in effect that shortly after the execution and delivery of the lease plaintiff and defendant agreed on what improvements and repairs were to be placed in said building to be put in first-class condition to be occupied as a first-class hotel, which was, among other things, that a bake-shop should be built in the rear of the premises, that the building should be painted and finished, the necessary partitions put up, sewerage and waterworks connection made, and that the rent of the premises thereafter should be $90 per month.

It is contended by plaintiff in error that the court erred in admitting said testimony, because he says that the terms of said lease could not be altered except by a contract in writing, and therefore the judgment is contrary to law. The testimony is objectionable for the reason that a lease for five years is one required by the statute of frauds to be in writing, which must contain the whole contract. To permit a party to sue partly on a written and partly on an oral agreement, as is here attempted, would be in direct contravention of the statute. 1 Beach on Contracts, *579, lays down the rule as stated and in section 577 says:

"It is also the general rule that the evidence necessary to take the contract out of the statute of frauds must be furnished by the writings; parol evidence not being admissible to supply evidence not found in the writings."

The lease providing, as it does in effect, that plaintiff was to make all necessary improvements and repairs to put the premises in first-class condition to be occupied as a first-class hotel, and that the parties thereto were thereafter to agree on what improvements and repairs were necessary so to do, standing alone was incapable of enforcement for uncertainty, for the reason that on its face, it left some essential terms to be agreed on in the future. Ringer v. Holtzclaw, 112 Mo. 519, 20 S. W. 800; Dayton v. Stone, 111 Mich. 196, 69 N. W. 515; Bumpus v. Bumpus, 53 Mich. 346, 19 N. W. 29; Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; Gates v. Gamble, 53 Mich. 181, 18 N. W. 631. Recognizing this fact, defendant sought to sustain his cause of action by a subsequent oral contract, the subject-matter of which is found in the original writing, while the contract

itself is found in the subsequent oral agreement sought to be proved, connecting itself with the writing as a part of its terms. To enforce said contract would practically annul our statute, *supra*, and the statute of frauds. If a part of the entire contract is void under the statute, it is void *in toto* (Fuller v. Reed, 38 Cal. 99), and thereby becomes reduced to the grade of a mere unwritten contract (Dana & Henry v. Hancock, 30 Vt. 616). Such subsequent oral agreement varied the terms of the writing contained in the lease, and plaintiff cannot recover upon said writing as thus qualified.

Hence we conclude that the testimony was improperly admitted, and the judgment contrary to law, in that it was based upon a parol contract void under the statute of frauds, and are of the opinion that the case should be reversed.

All the Justices concur.

MOREHOUSE v. TERRILL.

111 Ill. App. 460. (1903)

Statement by the court. This was an action on the case to cover damages from appellant for his having wilfully induced one Dooley to break a contract he had entered into with appellee for the purchase of some real estate.

On or about May 18, 1900, appellee accepted verbally a written proposition of that date made him by appellant and providing for an exchange of the latter's farm in McLean County, Illinois, subject to an incumbrance of $4,000, for the former's house and lot known as 1257 Fulton avenue, in Chicago, subject to an incumbrance of $4,250 and a payment of $2,000. Appellant was to furnish an abstract showing a good title in him to the lot by the Security Title and Trust Company.

This contract was superseded by a more formal one under the seals of the parties, dated May 22, 1900, which imposed upon appellee the additional obligations of also furnishing an abstract of title, each party to hand his abstract to the other within six days from the date of the contract, and deeds to be passed and the deal closed on or before June 1, 1900.

By a written contract, also dated May 22, 1900, appellee agreed to sell to William H. Dooley, and he agreed to buy from appellee, the

farm of appellant for $9,000, appellee to furnish an abstract showing good title in him to the farm, except as to the $4,000 incumbrance which the purchaser was to assume; deed to be delivered to Dooley on or before June 1, 1900, at which time he agreed to pay appellee, in cash, $5,000, being the difference between the purchase price and the incumbrance. By falsely representing to Dooley that the contract between appellant and appellee "had fallen through," appellant, on May 27, 1900, procured Dooley to break his contract with appellee, and then violated his own contract with the latter by selling and conveying the farm to Dooley for $9,000 without appellee's knowledge and thereby causing him a loss of at least $2,000 which appellee would have made as profit if appellant had conveyed the farm to him.

The jury were instructed *inter alia* that they might award punitive damages against appellant if they found that he had acted maliciously in the premises. There was a verdict and judgment against him for $2,000.

MR. JUSTICE STEIN delivered the opinion of the court.

The second contract between appellant and appellee was executed in duplicate. Over the objection of appellant the court received proof that after the execution of the other he had by parol waived the provision of the contract requiring the appellee to furnish an abstract of title to his lot. Both parties treat the furnishing of such abstract (unless waived) as a condition precedent to the maintenance of the action; and assuming this to be the law (as to which we express no opinion) the question arises whether proof of the parol waiver was admissible.

It is the long established law of this state that the terms of a contract under seal cannot be varied except by an instrument of the same dignity. Ryan v. Cooke, 172 Ill. 302; Starin v. Kraft, 174 Ill. 120. And this is so even if the contract would have been valid without a seal. Hume v. Taylor, 63 Ill. 43; Leach v. Farnim, 90 Ill. 638. But a mere waiver of a term or condition may be shown where it is in the nature of a release or a discharge and leaves the contract otherwise unchanged and introduces no new element into it. Mose v. Loomis, 156 Ill. 392; Starin v. Kraft, *supra*; Palmer v. Meriden B. Co., 188 Ill. 608; Dauchy Iron Works v. Toles, 75 Ill. App. 669; Robinson v. Nessel, 86 Ill. 212. In the case at bar the waiver operated as a release of the provision requiring appellee to furnish an abstract of title and was proper to be shown.

The circumstance that the conversation constituting the waiver was held betwen the execution of the contract and that of the duplicate

original, is of no importance. When the instrument first executed by the parties had been signed and delivered, there was a valid and binding contract even if the duplicate had not been executed. Hence the rule that a written contract cannot be altered or modified by proof of what was said by the parties before or during the making of it, does not apply.

Reversed and remanded on another ground.

HEALY v. YOUNG.

21 Minn. 389. (1875)

Action for rent reserved in a written lease of the Federal Union printing office, material, etc., at Rochester, Minn. Defense, that after the rent became due, the plaintiff, in consideration of $1,500, sold to defendant the property leased and relieved him from liability for the rent due. At the trial in the District Court for Olmstead County, before Mitchell, J., defendants had a verdict; a new trial was refused, and plaintiff appealed.

GILFILLAN, C. C. In this case there are two points made by appellant. First. That the verdict was against the evidence. Second. Error of the court below in admitting evidence.

The action was to recover for rent of certain personal property, under a contract dated February 1, 1873. One defence was that about September, 1873, the plaintiff, in consideration of $1,500 paid by defendant Young to plaintiff, sold to said Young the property, and released the defendants from all claims which he might have against them growing out of said contract, and especially the claim set up in the complaint. It is in respect to this defense that the alleged errors arise.

There was a motion for a new trial before the judge who tried the cause; and on looking over the evidence, we think there was such a conflict as to the release, that, unless there was error in admitting the evidence, the verdict ought not to be set aside. The sale of the property by plaintiff to Young was by a bill of sale in writing, in the following words: "For value received, and for and in consideration of the sum of fifteen hundred dollars paid and secured to me, the receipt of which is hereby acknowledged, I have and do hereby sell, assign and transfer unto H. H. Young all and singular the property known as the

Federal Union printing office, at Rochester, Minnesota, including all material, and all sums due said newspaper; said Young to pay all debts owing by said office, or on account of its business, while in my control.

"Attest: Geo. Healy."

"R. A. Jones."

The defendant, having introduced this bill of sale, then offered oral testimony to prove the release of the claim for rent, and the question is, Was such testimony competent? There is no question made as to the rule that where a contract is reduced to writing, parol evidence is inadmissible to contradict or vary it. But to give the writing this conclusive effect, the agreement itself must be reduced to writing. The rule does not apply where the written agreement is merely given in part-performance of the contract. The theory of the defendant is that the plaintiff agreed to release the debt and convey the property, and, in part-performance of that agreement, made the bill of sale. As the agreement to release relates to an entirely different subject-matter from that covered by the bill of sale, this theory, so far as it presents the question of law, is correct. The case is not distinguishable from Clarke v. Tappin, 32 Conn. 56; Baker v. Bradley, 42 N. Y. 316; and Jordan v. White, 20 Minn. 91. It is distinguishable from Cook v. Finch, 19 Minn. 407; for, in that case, it was attempted to show, by parol, that a bill of sale was intended to pass property not specified in it.

We think, therefore, the order denying a new trial should be affirmed.

PHELPS v. ABBOTT.

114 Mich. 88. (1897)

MONTGOMERY, J. Plaintiff and defendant were in 1886 and 1887 both breeders of blooded cattle. The plaintiff resided near Pontiac, and the defendant at Lapeer. In April, 1887, plaintiff had a public sale of stock at Pontiac, at which defendant was a bidder, and became the purchaser of a cow and calf at $300, and a heifer for $195. After the sale defendant gave his note to plaintiff for the sum of $495, due in one year the note being in the usual form of a negotiable promissory note. Shortly thereafter the heifer was returned, and the purchase price, $195, credited on the note. This action is brought to recover the resi-

due of the note $300, and interest. The defense set up is that, in the spring of 1886, defendant purchased of plaintiff a thoroughbred Hereford heifer named Rosabel at the price of $300, and gave his note in payment; that Rosabel was purchased for breeding purposes, but proved to be barren; that, prior to the public sale in 1887, defendant informed plaintiff that Rosabel was barren; and that the cow and calf and heifer bought in 1887 were purchased by defendant relying upon a statement then made by the plaintiff to defendant that, if future developments disclosed that Rosabel was in fact barren, plaintiff would adjust the purchase price which defendant had agreed to pay for Rosabel in any way that defendant thought would be right, and that such adjustment would be made by allowing such credit on the note in suit as defendant should think just and right, if said heifer Rosabel in fact proved barren. This defense prevailed in the circuit, and plaintiff brings error.

The testimony by which defendant made his case was given by himself.

But we think it was not competent to vary the terms of this note by showing by parol an agreement to reduce the amount agreed to be paid by the amount of damages which defendant may have sustained by reason of the heifer Rosabel having turned out to be barren. The note was absolute in form. By it defendant promised to pay a definite sum at a definite time. The testimony offered was for the purpose of showing that this sum was not payable absolutely, but that in a certain event a less sum was to be accepted in discharge of the note. It is a general rule of law that parol evidence is inadmissible to vary or contradict a written contract; therefore, if a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted. 1 Daniel, Neg. Inst. sec. 80. It cannot be shown that the sum agreed to be paid was different, nor that an additional sum agreed to be paid was different, nor that an additional sum was to be paid in a certain contingency, nor that a certain sum was to be deducted from the note, or the value of a certain article credited upon it. Id. sec. 81.

It is true that it is always competent to show by parol a total or partial failure of consideration, or that fraud or illegality taints the instrument. But the parol undertaking attempted to be shown in the present case does not fall within these apparent exceptions. It must be kept in mind that in case the attempt is not to assert a set-off. Defendant's claim, if any, was unliquidated. The defense was possible in this action only if the defendant could attach his alleged agreement to the note itself, and show that plaintiff had agreed to reduce the amount

of the note by such a sum as should be found his due on the original transaction, if any. Nor was there a failure of consideration for the note. The attempt is to show that the promise which was made in writing is not in truth the promise which defendant made. We think, under the authorities cited, this should be held incompetent.

Judgment reversed, and a new trial ordered.

GERMANIA BANK OF MINNEAPOLIS v. C. F. OSBORNE.

81 Minn. 272. (1900)

LEWIS, J. Action on a promissory note for $400, due ninety days after date, payable in United States gold coin or its equivalent, with interest.

To the complaint on this note defendant alleged, as a "defense and counterclaim," that to induce the defendant to purchase four shares of its capital stock, so that he might continue to be one of the directors of the bank, the plaintiff agreed with defendant that, if he would purchase the four shares, it would receive as the purchase price thereof defendant's promissory note for $400, payable ninety days after date, with interest at three per cent. per annum, and renew the same from time to time as it became due by accepting and receiving a new note of like tenor and effect; that at any time defendant ceased to be director of said bank, plaintiff would take back and repurchase the same and pay the same price paid by defendant therefor, surrendering and delivering to him said note so given as the purchase price of said stock, or any note for $400 given by defendant in renewal thereof; that, in pursuance of such agreement, the stock was issued to defendant, and he gave his note therefor in the sum of $400, and that the note upon which the action is based was the last renewal of the same; that, long prior to the commencement of this action, defendant, having resigned as director of said bank, and being desirous of returning, surrendering and reselling the stock to plaintiff, offered to resell, assign, transfer, indorse, and surrender the same to plaintiff, and offer to pay the interest upon the note, and demanded that plaintiff surrender and deliver the note to defendant, which was refused.

Issue having been joined, when the cause came on for trial in the court below plaintiff introduced the note, and rested; whereupon defendant attempted to prove the facts set forth in the answer. Ob-

jection was made upon the ground that the examination called for oral testimony which tended to vary or alter the terms of the note. The objection was sustained, and the court directed a verdict for plaintiff in the full amount of the note and interest. From an order denying his motion for a new trial, defendant appeals.

In what respect written contracts may be affected by parol testimony is a problem frequently confronting the practitioner and demanding the attention of the courts, and in respect to that particular phrase of its application involved in the case before us able courts have arrived at different conclusions. We should first determine what the contract was between these parties, and what relation the note bears to it. The contract was, in substance, a sale of the stock in consideration of the execution and delivery of the note, coupled with the right to return the stock and take up the note. The note expresses only the method of payment in case the maker did not exercise the right to return the stock. The note is in terms just what the parties agreed it should be. The contract preceded the execution and delivered as a result of the contract, not as itself the contract. The consideration for the note was the stock, provided the maker exercised the option to retain it.

The consideration for the delivery of the stock was the payment of $400, according to the terms of the note, provided the maker exercised the same option. Although the whole transaction was an entirety, and the agreement for the sale was in a sense contemporaneous with the execution of the note, yet the parties did not reduce the agreement for the sale to writing in the terms of the note.

In the case before us the defensive matter contained in the answer is set forth as a counterclaim, and affirmative relief is demanded. The evidence in support of the counterclaim tended to make out a case which would defeat the collection of the note, but it did not change its terms. The evidence was directed to the right to enforce payment, not the method of payment. If payment could be enforced at all, it must be according to the terms of the note. Such was the issue tendered by plaintiff. But there was, under the issue tendered by the counterclaim, the question of the right to enforce payment of the note. Hence it follows that the evidence offered did not tend to change the terms of the written instrument.

Order reversed and a new trial granted.

GILBERT & CO. v. McGINNIS et al.

114 Illinois. (1885)

MR. JUSTICE MULKEY delivered the opinion of the court:

On the 16th of February, 1881, Patrick McGinnis, the appellee, sold to the appellants, Herbert S. Gilbert & Co., seven thousand bushels of corn, at thirty-nine cents per bushel, to be delivered in the months of August and September following. As a part of the same agreement the appellants promised to make advances on the contract to appellee of what money he might, from time to time, require. A short time after the making of this agreement, appellee called on the appellants, at their business house in Ottawa, and requested an advance on the contract, as per agreement. The clerk in charge of their business told him he could have the money, and commenced writing a note for the amount, whereupon appellee stated to the clerk he would not sign a note, remarking, in effect, that if he wanted to obtain money in that way he could get it from the bank. Appellants refused to make the required advance unless appellee would give his note for the amount. This he declined to do, and informed the clerk at the time he would not let appellants have the corn. The corn not having been delivered within the time specified in the agreement, the appellants, on the 3d day of October, 1881, commenced an action of assumpsit, against appellee, in the Circuit Court of La Salle County, to recover damages for the non-delivery of the corn, which resulted in a judgment in favor of the defendant, for costs. This judgment having been affirmed by the Appellate Court for the Second District, the plaintiffs appealed to this court.

On the trial the plaintiffs offered to show there was a general custom among grain merchants to take notes from the seller for the amount of advances made under contracts for the sale of grain, like the one in question. They also proposed to prove that on previous occasions there had been contracts and dealings similar in character to the one sued upon, and that the manner of dealing between the parties was, when an advance was made, memoranda or notes should be taken for the money advanced. The court declined to admit evidence to the jury in support of either of these positions, and the ruling of the court in this respect presents the only question for determination. The same question is raised by certain refused instructions asked on behalf of the appellants.

The rule is well recognized that where a commercial contract is in

any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intentions of the parties, and to aid the court in arriving at its true construction, will be admissible in evidence. Such evidence is not only admissible for the purpose of explaining the terms of a contract, but also for the purpose of ingrafting, as it were, new terms into it, subject, however, to the qualification that such new terms are not expressly or impliedly excluded by the express agreement. (1 Smith's Leading Cases, 307, *et seq.*) To have this effect, however, the usage must be reasonable, and not in conflict with any general rule of law. (Macy et al. v. Wheeling Ins. Co., 9 Metc. 354.) The proof offered in this case was clearly not for the purpose of explaining any ambiguity in the contract, or for the purpose of showing that some particular word or phrase in it is used out of its ordinary signification. No claim of this kind is made. It is conceded by both parties that appellants were to make advances—that is, let appellee have money, from time to time, as he might need it, under the contract. So far there is no controversy. But appellants contend that a custom or usage prevailed, not adverted to in the express agreement, which required the appellee to give to them his note upon receiving any such advances. The usage here sought to be shown, it is clear, was for the purpose of adding a stipulation on the part of appellee which, it is conceded, is not found in the express agreement. This, as we have already seen, may sometimes be done; but whether it could be done in this particular case depends upon whether the stipulation thus to be added is inconsistent or in conflict with that part of the agreement which is expressed, and about which there is no controversy. We are clearly of opinion that it is, and that the trial court therefore ruled properly in excluding the evidence and in refusing the instructions complained of.

An advance or payment of money on a contract of sale, without doubt, is altogether a different thing from that of obtaining money from the purchaser on the seller's own note. The legal effect of the transaction in the first case is to extinguish, *pro tanto,* the seller's claim and the purchaser's corresponding liability. In the second, no part of either is extinguished. Instead of collecting something on his corn, as provided by the agreement, the seller is offered a loan of money on his individual note, which would be a complete change of the legal relations of the parties. Whereas the seller was, before, a mere creditor of the purchaser, he at once, upon giving such a note,

becomes the debtor of the purchaser, and no part of the debt due him on account of the sale is thereby discharged. Thus it is seen the legal effect in the one case is practically the very opposite of what it is in the other, and might in many cases result in the grossest injustice. For instance, had appellee given his note for the required advance, the appellants might, the next hour thereafter, have transferred it to another for value, and appellee would have been compelled to pay it, whether he ever got a cent for his corn or not. This is apparent. That one will not be permitted to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself, will hardly be questioned. This is not only the universally received doctrine on the subject, but it has been often fully recognized by this court. Cadwell v. Beek, 17 Ill. 220; Bissel v. Ryan, 23 id. 566; Deshler v. Beers, 32 id. 368; Wilson v. Bauman, 80 id. 493. In the editor's note to Wigglesworth v. Dalleson, Smith's Leading Cases, 309, it is said: "Evidence of usage, though sometimes admissible to add to or explain, is never to vary or to contradict, either expressly or by implication, the terms of a written instrument,"—citing in support of the proposition, Magie v. Atkinson, 2 M. & W. 442, Adams v. Worldley, 1 id. 374, Freeman v. Loeder, 11 A. & E. 589, and Gates v. Pym, 6 Taunt. 445. The rule here stated is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case.

It follows from what we have said, and the authorities cited, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

THE BAGLEY AND SEWALL COMPANY v. THE SARANAC RIVER PULP AND PAPER COMPANY.

135 N. Y. 626. (1892)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 30, 1891, which affirmed a judgment in favor of plaintiff, entered upon a verdict and denied a motion for a new trial.

This was an action to recover the contract price for certain machinery sold by plaintiff for defendant.

The facts, so far as material, are stated in the opinion.

The guaranty for the breach, of which the defendant sought to counterclaim damages, is contained in the written proposition made by the plaintiff to the defendant October 30, 1888, and orally accepted by the defendant, for the sale to the defendant of two "wet machines", to be used in the manufacture of wood pulp, after the process of grinding the pulp had been done by other machines constructed for that purpose.

The clause of guaranty is as follows: "We will guaranty the above machines to take care of all the pulp produced from four Scott grinders, and deliver the pulp 50 per cent dry." When the proposition was made, the defendant was engaged in erecting a pulp mill on his premises, and had contracted with the manufacturer of the Scott grinders for four grinders to be placed in the mill. They were subsequently placed in teh mill, as were also the machines purchased from the plaintiff.

The defendant, in support of its contention, gave evidence tending to show that the machines bought of the plaintiff would not take care of all the pulp produced by the four grinders placed in the mill, and deliver it fifty per cent dry. The four grinders would produce about eight tons of pulp a day, and the machines purchased of the plaintiff, while they would provide for that quantity, would not deliver it fifty per cent dry, but forty to forty-five per cent dry. It was established on the part of the plaintiff that the machines would take care of at least six tons of pulp per day, and deliver it fifty per cent dry, being an amount equal to 3,000 pounds of pulp for each grinder.

The plaintiff in answer to the alleged counterclaim was permitted to show that the guaranty was given upon the representation of the defendant that the Scott grinders, for which they had contracted, had a capacity of producing each 3,000 pounds of pulp per day, and that the proposition and guaranty were based upon this production. The point insisted upon in behalf of the defendant is that this evidence was inadmissible, because in violation of the rule excluding oral evidence to contradict a written contract. Whether this evidence was in violation of the rule invoked is the main question in the case. The negotiation between the parties did not have its inception at the date of the proposition (Oct. 30, 1888). On June 27, 1888 the defendant addressed a letter to the plaintiff saying: "We have already made a trade for four grinders, that are guaranteed each to make 3,000 pounds every 24 hours, dry weight, and now we want to get a press to take care of it." In another letter of October 16, 1888, the defendant said:

"The machines we are putting in are guaranteed each to make 3,000 pounds, dry weight, pulp each 24 hours, or the four machines will turn out six tons a day. Now will one of your 72-in. machines take care of this amount of pulp?" The conversation between the parties concurrently with the date of the proposition (Oct. 16, 1888), shows that the guaranty was made upon the basis that the capacity of the Scott grinders to be placed in the mill was 3,000 pounds per day.

The inequity of the alleged counterclaim is apparent. But this is no answer to the rule of law invoked, if by its proper application it excludes a consideration of the facts referred to.

We think it may well be doubted whether the letters of June 27, 1888, and October 16, 1888, may not be considered as parts of the written contract for the sale of the machines. The proposition of guaranty of October 30, 1888, was its culmination, but the previous letters of the defendant explain the application of the guaranty, and being themselves in writing their consideration does not contravene the principle upon which oral terms are forbidden to be engrafted upon written contracts. But passing this we are of opinion that the oral evidence was competent to ascertain and define the capacity of the grinders to which the guaranty related. The parties were contracting for machines which would take care of the pulp produced by "four Scott grinders," and deliver it at a certain dryness. The amount of pulp produced depends, as the evidence shows, upon the capacity of the grinders and the power applied. Scott grinders are manufactured of varying capacity. The plaintiff had no knowledge of the capacity of the grinders which were to be placed in the mill, except as informed by the defendant. It would be unreasonable to suppose that in making the contract with the plaintiff, the parties contracted without reference to the capacity of the grinders to be used, or that by the words, "all the pulp produced by four Scott grinders," the parties intended all the pulp which could be produced by any Scott grinders operated with any power, however great. The extrinsic circumstances show that they had reference to the production of the four grinders contracted for, having the capacity represented by the defendant.

In interpreting the guaranty, parol evidence indentifying the machines known as Scott grinders is essential. The fact that the grinders are of different productive capacity, involves the further inquiry, to grinders of what capacity did the parties refer? This we think was the subject of explanation by parol evidence. Such evidence does not contradict the written contract, nor does it add a new term thereto.

It simply makes intelligible what needs explanation, full force is given to all the words, without adding to or detracting anything therefrom. (See Chapin v. Dobson, 78 N. Y. 74; Schmittler v. Simon, 114 id. 177; 1 Green Ev. *227 et seq.*)

The parol evidence was not admitted to limit the guaranty to a part of the product of the Scott grinders which the parties had in mind, but to show the particular grinders referred to and their capacity, and that the contract related to grinders of that description.

The conclusion we have reached renders it unnecessary to consider any of the other questions in the case. The facts as to the contemporaneous oral understanding of the parties and the other extrinsic facts are undisputed, and the plaintiff was entitled to judgment thereon.

The judgment below is therefore affirmed, with costs.

MAURIN v. LYON.

69 Minn. 257. (1897)

Action in the District Court for Stearns County by Marcus Maurin and Peter Maurin, co-partners as Maurin Brothers, against George Tilestone to recover the purchase price of 1,520 bushels of wheat sold by plaintiffs to defendant at the agreed price of 86 cents per bushel. Defendant in his answer set up a counterclaim for $1,041.96, alleged to be due defendant for wheat sold to plaintiffs under another contract. The case was tried before a referee, who found in defendant's favor on his counterclaim. While the action was pending defendant died, and D. E. Lyon, his executor, was substituted as defendant. From an order, Searle, J., denying plaintiffs' motion for a new trial, they appealed. Reversed.

MITCHELL, J. Defendant's counterclaim is founded on an alleged purchased of 5,000 bushels of wheat by the plaintiffs from the defendant's testate, Tileston. The principal points urged by the plaintiffs are (1) that there was no sufficient memorandum of the contract of purchase to take the case out of the statute of frauds, and that parol evidence was improperly admitted to explain the terms of the written memorandum; (2) that the alleged purchase was the individual transaction of the plaintiff Marcus Maurin, and not within the scope of the partnership business.

1. The written memorandum was in the words and figures following:

"St. Cloud
"7-6-96
"Sold Maurin Bros.
"Cold Springs
"5000, 1° July Del.
"99 c. Duluth

"(Signed) Geo. Tileston & Co.
"Maurin Bros.

Both parties were engaged in buying and selling grain, and were presumably acquainted with technical terms of the trade. The Referee who tried the cause admitted, over the objection and exception of the plaintiffs, parol evidence that in the trade, among buyers and sellers of wheat, the character "1°" was used to indicate the grade of the wheat, and meant, "Grade No. 1 Northern wheat"; also, that 'July Del." meant July delivery (that is, that the wheat was to be delivered during July); that "99 c. Duluth" indicated the price per bushel and the place of delivery Duluth; that these were the meanings of the characters and terms used in the memorandum, as understood by the usages and customs of the trade among wheat men.

This evidence to show that abbreviations, and apparently ambiguous statements of description, price, etc., have a recognized meaning in the trade, and hence are a sufficient statement of the terms of the contract. This is the rule as to various abbreviations and apparent ambiguities of this nature in brief notes of mercantile contracts which are often composed, to use the language of Parje, E., in Marshall v. Lynn, 6 Mees. & W. 109, 118, in "a sort of mercantile shorthand, made up of few and short expressions, which generally express the full meaning and intention of the parties." Browne, St. Frauds, § 380. See, also, Paine v. Smith, 33 Minn. 495, 24 N. W. 305; Olson v. Harpless, 53 Minn. 91, 55 N. W. 125; Merchant v. Howell, 53 Minn. 295, 55 N. W. 125; Merchant v. Howell, 53 Minn. 295, 55 N. W. 131. The parol evidence admitted in this case neither varied nor added to the written memorandum, but merely translated it from the language of the trade into the ordinary language of people generally. The memorandum, as thus translated, fulfilled all the requirements of the statute of frauds.

LEBUS v. BOSTON etc.

107 Ky. 98. (1899-1900)

JUDGE BURNHAM delivered the opinion of the court.

This action was brought by appellant against appellees to recover damages for obstructing a passway leading from a public highway over the lands of appellees to those of appellant, and to enjoin the further interference of the use of said passway by appellant.

It is earnestly insisted by counsel for appellant in their petition for rehearing that parol evidence is inadmissible to show that at the time of the conveyance it was agreed between the grantor and the grantee that there was no necessity for the passway, as the grantor had another outlet to another pike, and other ways to get out, and that it was then agreed that there was to be no passway over the land conveyed, and the deed was accepted only on this distinct understanding. Counsel insist that the passway, being an interest in land, can only be created or destroyed by a contract or agreement in writing, and that to admit the parol evidence referred to is to depart from those broad, fundamental principles of law that have been recognized for time immemorial. This would be true if the evidence infringed the terms of the deed, but that is not the case. The grantor by his deed in this case conveyed to the grantee the whole boundary of land described in the deed. This passed the entire title to all within the boundary so described, from the center of the earth *usque ad coelum,* including the ground over which the passway ran. The passway was therefore included by the terms of the deed, and *prima facie* passed under it. But, as said in the opinion, the one exception allowed by the authorities in favor of a grantor where he has conveyed the fee of land "is ways or easements of necessity." And, as is well said by the learned author there quoted, "it is only in cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied reservation can be invoked." (Jones on Easements, section 136.) Appellant's entire claim to the passway rests upon this doctrine of implied reservation. Whether this is a case of strictest necessity, where it would not be reasonable to suppose that the parties intended the contrary, the court can only know when the facts are shown by parol evidence. When these facts are shown by parol evidence, then the presumption of an implied reservation arises. But it is well settled that a presumption raised by parol evidence may also be rebutted by parol evidence. The rule is thus well stated in 3 Greenleaf on Evidence, section 366:

"In certain cases of presumption of law, also, parol evidence is admitted in equity to rebut them. But here a distinction is to be observed between those presumptions which constitute the settled legal rules of construction of instruments, or, in other words, conclusive presumptions, where the construction is in favor of the instrument, by giving to the language its plain and literal effect, and those presumptions which are raised against the instrument, imputing to the language, *prima facie,* a meaning different from its literal import. In the latter class of cases parol evidence is admissible to rebut the presumption and give full effect to the language of the instrument, but in the former class, where the law conclusively determines the construction, parol evidence is not admissible to contradict or avoid it."

In Wharton on Evidence, sections 973, 974, the same rule is fully stated and illustrated.

Though the terms of the deed *prima facie* convey the entire boundary, including the passway, parol evidence of the absolute necessity of the passway is admitted in this case to raise a presumption against the instrument, imputing to it a meaning different from its literal import. The presumption against the instrument may be rebutted by parol evidence, so as to give to its language its plain and literal effect. The proof offered by appellant to show the necessity of the passway might be rebutted by proof that it was unnecessary. It would not, perhaps, occur to counsel that parol evidence for the appellee showing that the passway was unnecessary would be inadmissible. But there is no better proof that it was unnecessary than the agreement of the parties at the time of the conveyance that the grantor had another outlet, and did not need this one. When he agreed it was not necessary, and not to reserve it, in order to induce the grantee to accept the deed, the estoppel may be shown by the same kind of evidence as the implied right.

Petition overruled.

BRICK v. BRICK.

98 U. S. 514. (1878)

MR. JUSTICE FIELD delivered the opinion of the court.

In 1864, between the 7th and 27th of September, the appellant, Samuel R. Brick, a resident of Philadelphia, purchased eight hundred

and ninety-two shares of stock in the Washington Gas-light Company, a corporation existing in the District of Columbia, chartered by Congress, paying for the same $17,277. Of this stock, two hundred and fifty shares were afterwards transferred by his direction on the books of the company to his brother, Joseph K. Brick, a resident of Brooklyn, N. Y., to whom a certificate was issued and from whom a check for $5,250 was received. The question presented is whether this transaction between the brothers was a sale of the stock, or a loan of money on its pledge. Joseph K. Brick is dead, and the evidence as to the character of the transaction is conflicting, as is generally the case when the object of parties in the execution of instruments is not expressed in writing, and is sought years afterwards to be shown by parol. But notwithstanding such conflict, there are certain facts established, indeed not controverted, which must control our judgment.

In the first place, it appears that in September, 1864, the appellant was anxious to purchase stock in the gas company. He had become acquainted with its affairs, and knew that it intended to apply to Congress for power to increase its capital, and was convinced that with such increase the value of the stock would be greatly enhanced. He expressed this conviction in letters to his son, which the complainants produced; and, acting upon it, he purchased to an extent beyond his means of immediate payment, and gave his note for a portion of the purchase-money.

In the second place, the appellant applied to his brother, Joseph, for a loan of money, at the time he was expressing his anxiety to buy the stock of this company, and his brother replied that the money could be raised on call. It was not many days afterwards when a check for the $5,250 was sent.

In the third place, in May and July, 1866, Joseph stated, under oath, that he was not the owner of the stock. In the previous year he had given to the board of assessors of Brooklyn a statement of his personal property, in which he had specified the stock of the gas-light company, valuing it at $5,000, and was accordingly assessed upon it. In May, 1866, he made oath that he had been thus erroneously assessed, and that the error had arisen from his having inserted in the statement the stock held by him for his brother, in which he had no pecuniary interest. The assessment was accordingly corrected. On the same day, he wrote to his brother what he had done, saying that he had told the assessors he held the stock for the latter's benefit, and requesting him to advise the president and secretary of the company that such was the case. And in the statement of his personal

property for that year, made in July following, he omitted the stock in question, and verified the statement with his oath that he had no personal property not included in it.

So far from questioning the character of this testimony, the complainants refer to it in their bill, annex copies of the oaths taken, and observe that the stock was purchased to aid Samuel in some matters of business, and was often spoken of as his, though not so in fact, but that being unproductive, the oaths were made by Joseph in order to get rid of the tax assessed against him and make Samuel pay it. as if this circumstance could possibly extenuate what, if not true, was simple perjury.

This bill is signed by the widow of the deceased, and the suit is prosecuted by her and the executors of his will; but we do not think that the evidence in the case justifies the reproach they would cast upon his name and character. There are casual observations made by him, sometimes in loose conversation, mostly in friendly letters, which, unexplained, would indicate that he was owner instead of mortgagee of the stock, expressions not at all unnatural where one holds the absolute title to property; but there is nothing in them which overcomes the weight of his affirmation under oath, supported as that is by all the attendant circumstances.

We are satisfied that the certificate of the two hundred and fifty shares was issued to the deceased as security for a loan, and not upon a purchase. It is competent to show by parol what the transaction was. In the late case of Peugh v. Davis (96 U. S. 336), we stated the doctrine of equity on this subject, where an instrument was in form a conveyance, but was in fact intended as a security; and though the instrument there was a deed of real property, the principle applies when the instrument purports to transfer personal property. A court of equity, we there said, "looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or

for any object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice." Hughes v. Edwards, 9 Wheat. 489; Russell v. Southard, 12 How. 139; Taylor v. Luther, 2 Sumn. 228; Pierce v. Robinson, 13 Cal. 116.

As in our opinion the appellant is the owner of the stock in question, and his brother held it merely as collateral security for the $5,250 loaned, it is unnecessary to consider what, if any, effect is to be given to the decree obtained in the former case of Samuel Brick against the executors of the deceased. Assuming that the District Court never acquired jurisdiction over the executors resident in the State of New York, the situation of the parties remains as previously; and upon payment of the loan with interest, after proper credits for the dividends received, the appellant will be entitled to the possession of the certificate. The present suit proceeds upon the theory that the stock belongs to the estate of the deceased, and is not held as security. It seeks to enforce a claim of ownership to the property, and not the payment of the loan by its sale.

The decree must, therefore, be reversed, with directions to the court below to dismiss the bill; and it is

So ordered.

MARCH v. McNAIR.

99 N. Y. 174. (1885)

EARL, J. In 1869 the plaintiff and her two sons, John R. and Charles H. Marsh, resided at Avon in this State. At the same time Chauncey W. Gibson resided at Lima in the same county where he carried on the business of a private banker under the name of the Exchange Bank, and he was a local agent of the National Life Insurance Company. In April of that year John R. and Charles H., through Gibson as agent of the company, procured two policies of insurance on their own lives for $5,000 each. The policy on the life of John R. was payable to Charles H. as the assured, and that on the life of Charles H. was payable to Mary Marsh, the plaintiff, as the assured. These policies remained in the possession of Gibson down to the 23d day of May, 1872, and during that time he advanced the money to pay the

premiums upon them, John R. and Charles H. giving him their checks upon his bank for the amounts thus advanced; and during that time it appears that he held the policies as collateral security for a large indebtedness due from them to him. On the 23d day of May, 1872, the plaintiff assigned the policy on the life of Charles H., in which she was interested, to Gibson by an assignment, absolute in form, for the expressed consideration of $1, "and for other valuable considerations." On the same day, and at the same place, she, with her two sons, also executed an instrument, of which the following is a copy: "This is to certify that in consideration of crediting C. H. March at the Exchange Bank of Lima $353.72, paying mortgage (on property formerly deeded by J. R. Marsh, in Avon, to C. W. Gibson) given by William F. Russell to C. H. Marsh, $110.46, and indorsing $35.82 upon a note made by C. M. Marsh June 8, 1871, for $300, we jointly and severally sell, assign and transfer all our right, title and interest in two policies, Nos. 4277 and 4287, upon the lives of Charles H. Marsh and John R. Marsh, issued by the National Life Insurance Company of the United States of America to Chauncey W. Gibson, of Lima, N. Y.

"Dated Avon, N. Y., May 23, 1872.

"J. R. Marsh,
"C. H. Marsh,
"Mary Marsh."

In February, 1874, Gibson, having become insolvent, made a general assignment for the benefit of his creditors to the defendant McNair, and assigned that policy to him as a part of his assets. McNair, subsequently, by a suit against the insurance company, recovered the amount insured; and then in the year 1876, the plaintiff claiming that the assignment to Gibson was made merely as collateral security for an indebtedness to him of $500, due to him from her sons, tendered him that amount and demanded the money recovered by him on the policy; and upon his refusal to pay she commenced this action. In her complaint she demanded, besides other relief, judgment against him that the instrument above set forth be reformed, so as to conform to the agreement and intention of the parties thereto, by reciting and stating therein that the same was made and executed as collateral security for the payment to Gibson of the sum of $500, and interest. The defendant in his answer claimed that the assignment was absolute and not given as collateral security. Upon the trial, the plaintiff gave parol evidence, tending to show that the instrument was executed by the plaintiff, upon an assurance that it was only intended as collateral security for $500, and that she signed it for that purpose. At the

close of the evidence the defendant moved to dismiss the complaint upon several grounds, one of which was that the plaintiff was concluded by the agreement contained in the assignment executed by her and her two sons, for the reason that the contract made by the writing could not be varied or contradicted by parol evidence. The court denied the motion and defendant's counsel excepted, whereupon the court made findings, among which is the following: "That the said assignments were and each of them was executed and delivered by the plaintiff, upon the representations and agreements of the said Gibson and of his agents who procured the same to be executed, that the same were intended to be held and used as collateral security to an indebtedness of the said J. R. Marsh and Charles H. Marsh to the said Gibson in the sum of $500, and for no other purpose." And he ordered judgment in favor of the plaintiff for the sum of $6,710.12, which was the balance of the money in defendant's hands received upon the policy, including interest after deducting the $500, and the premium paid by Gibson April 7, 1873.

There was no allegation in the complaint that the plaintiff was induced to execute the instrument by any fraud, or that it was executed by the parties under any mutual mistake of facts; and there was no finding by the trial judge that any fraud was perpetrated upon her, or that the parties labored under any mistake in executing the instrument. The finding was simply that the instrument was intended to be held and used as collateral security. It was not reformed or annulled by the judgment, and the plaintiff was permitted to recover by simply proving by parol that the instrument absolute in form was intended as collateral security; and the sole question for our determination is, whether the parol evidence was competent, and sufficient to show that the instrument was to have force and effect only as collateral security and not as an absolute transfer of the policy.

We are of opinion that the parol evidence was incompetent, and that upon the case as it appears in the record, the plaintiff was not entitled to recover. It is well settled in the law of this state, that an instrument assigning or conveying real or personal property in absolute terms may by parol evidence be shown to have been intended as security only. While this rule is an exception to the general rule of evidence, forbidding the contradiction or explanation of written instruments by parol evidence, it has long been established in the law of this state. It grew up in the equity courts from the efforts of equity judges to prevent forfeitures, to relieve against frauds, and to enforce the equitable maxim, "once a mortgage always a mortgage."

It was supposed that the evidence did not contradict the instrument, but simply showed the purpose for which it was given, and that the instrument, although purposely made absolute, was so made, however, simply for the purpose of giving security to the party to whom it was given, which was not really inconsistent with its form. Hence, it was conceived that parol evidence showing the purpose was not an invasion of the general rule forbidding such evidence to vary, explain or contradict a written instrument. The rule having been established in chancery, was finally, after the Code, and the union of law and equity jurisdiction in the same court, made applicable to cases both in law and in equity. So, if this were simply an absolute assignment of the policy to Gibson, there could be no question under the law of this state, that the plaintiff could be permitted to show by parol that it was intended as collateral security. But here there was more than a simple assignment. Both instruments, executed at the same time, and relating to the same transaction, must be considered together, and hence the effect of both is really to be found in the instrument above set out.

By its terms the precise consideration upon which the policy was assigned is specified, and that is stated to be that Gibson was to credit Charles H. Marsh with the sum of $353.72 at his bank, which sum was in fact an overdraft by Charles at the bank; and that credit was made. Gibson was also to pay a certain mortgage upon real estate which John R. Marsh had conveyed to him, and, as otherwise appears, which he had conveyed with covenants that the premises were free and clear of incumbrances; and he was to indorse $35.82 upon a note for $300, which he held against Charles H., and that indorsement he made; and these sums together amounted to the precise sum of $500. This instrument is more than an assignment. It contains what both parties agreed to do. It shows that the assignment was made for the purposes mentioned, and precisely what Gibson was to do in consideration thereof. He became bound to do precisely what was specified for him to do, and he could have been sued by the assignors for damages if he had failed to perform. Hence the instrument is not a mere assignment or transfer of the policy. It is a contract in writing within the rule which prohibits parol evidence to explain, vary or contradict such contracts.

It is believed that no case can be found where parol evidence has been received for the purpose of showing that such an instrument was given merely as collateral security and not for the precise purpose mentioned in it. Without commenting upon the authorities the

following are ample to show that the evidence was not competent. (1 Greenl. on ev., 275; McCrea v. Purmort, 16 Wend. 461; Kellogg v. Richards, 14 id. 117; Goodyear v. Ogden, 4 Hill, 104; Graves v. Friend, 5 Sandf. 568; Coon v. Knap, 8 N. Y. 402; Cocks v. Barker, 49 id. 107; Hinckley v. N. Y. C. & H. R. R. R. Co., 56 id. 429; Van Bokkelen v. Taylor, 62 id. 105; Shaw v. The Republic L. Ins. Co., 69 id. 286; Cram v. Union Bank, 1 Abb. Ct. App. Dec. 461; Wilson v. Deen, 74 N. Y. 531; Eighmie v. Taylor, 98 id. 288.)

If the plaintiff could show that this agreement by the mutual mistake of the parties did not express their real intention, she could have it reformed; or if she could show that she was induced to execute it by the fraud of Gibson, she might have it annulled. But in the absence of an allegation and of proof and finding that there was either fraud or mutual mistake, the instrument must have force and effect according to its terms, and cannot be varied, explained or contradicted by parol evidence.

It follows from these views that the judgment of the General Term should be reversed and a new trial ordered, costs to abide the event.

All concur, except RUGER, Ch. J., dissenting.

Judgment reversed.

Notes. **The parol evidence rule is exceedingly vague, and the decisions pertaining thereto are, in some respects, quite conflicting.**

The term "parol" is of French origin, and has various meanings. Its literal meaning is *word* or *speech*. In this sense it is synonymous with the term *oral* which is restricted to spoken words. The terms *oral* and *verbal*, although frequently used interchangeably, are not synonymous. The latter term is equally applicable to both spoken and written words. Strictly speaking, therefore, it would be more appropriate to use the term "verbal evidence rule." The term *parol*, as used in the rule, is misleading. As said by Dean Wigmore, "It must be understood to be employed in a purely unnatural and conventional sense" (Wigmore on Evid., vol. IV, § 3369).

Professor Thayer, in speaking of the parol evidence rule, says, "Few things in our law are darker than this, or fuller of subtle difficulties" (6 Harvard Law Review 325). Much of the confusion and conflict in the decisions, as regards the application of the rule, is the fact that courts frequently apply it to matters where no law of evidence is involved. In its application, the rule is restricted to written instruments; but it does not follow from this that the rule is applicable to any writing involved in a case, under all circumstances. In many cases the admissibility of testimony concerning writings is governed by rules of the substantive law, in which cases the parol evidence rule has no application.

The chief reason assigned for the existence of the rule are uncertainty of "slippery memory" and danger of falsehood.

The rule had its origin in the common law. In some states, however, there are statutes declaratory of the common law.

PART VI.

WEIGHT AND SUFFICIENCY.

THOMPSON LUMBER CO. v. INTERSTATE COMMERCE COMMISSION.

193 Fed. Rep. 682. (1912)

Petition by the Thompson Lumber Company and others against the Interstate Commerce Commission, in which the United States and the Illinois Central Railroad Company intervened. Demurrer to petition overruled, with leave to answer.

ARCHBALD, Judge. This case does not differ in principle from that of Russe & Burgess, 193 Fed. 678, just decided. Indeed, the two are linked together by the Commission, the decision in the one on the subject of laches being given as a reason for the decision in the other.

The rate complained of before the Commission was that on hardwood lumber from Memphis to New Orleans for export. The rate charged was 12 cents a hundred pounds, and complaint was made against the Illinois Central Railroad, the Yazoo & Mississippi Valley Railroad, and the St. Louis, Iron Mountain & Southern Railroad; these being the three lines by which shipments of such lumber are made between the points mentioned at the rate in question. The Commission dismissed the complaint as to the St. Louis, Iron Mountain & Southern, but held that as to the Illinois Central and the Yazoo & Mississippi Valley the 12-cent rate was unreasonable; 10 cents per hundred pounds being fixed as the maximum. The Yazoo & Mississippi Valley was not served in the present case and has not appeared, and the case therefore proceeds only against the Illinois Central.

As to the reparation claimed on the 10-cent basis, the Commission said:

"We cannot award damages in this case based upon the use of the 12-cent rate up to the date of the filing of the complaint because of the laches of the complainants and because the record does not conclusively disclose that the rate was unreasonable prior to said date. The questions of law as to the reparation and the amount thereof

under the above ruling will be reserved for consideration at a later date."

Not satisfied with the situation in which the case was so left, the petitioners applied for a rehearing and modification of the order, assigning among other things that the Commission erred in the ruling made; it being urged in that connection in the brief filed that there was no place for the application of the doctrine of laches, nor for any limitation other than that imposed by the statute, and that in holding the petitioners to conclusively prove the unreasonableness of the rate prior to the filing of the complaint the Commission was enforcing a degree of proof not justified upon any principle. But notwithstanding this, and with its attention thus called to the matter, the Commission in a further report declined to modify the order. The present bill was then filed, the same as in the Russe & Burgess Case, in the Circuit Court of the United States for the Northern District of Illinois, and after same intermediate proceedings comes up now on demurrer by the Interstate Commerce Commission joined in by the United States and the Illinois Central Railroad intervening.

(1) Nothing need be added to what is said in the Russe & Burgess Case on the subject of laches. So far as the action of the Commission in refusing complete reparation is based on the application of that doctrine to shipments which preceded the filing of the complaint, it is clearly invalid.

(2) The other ground assigned by the Commission for its action, in our judgment, is equally untenable. To require conclusive proof of the unreasonableness in the past of the rate complained of was to set up a standard which is exacted, if ever, in only the most extreme cases.

"Where an adverse presumption is to be overcome, or, on grounds of public policy and in view of peculiar facilities for perpetrating injustice by fraud and perjury, a degree of proof is sometimes required which is variously designated as 'clear', and 'conclusive', 'clear, precise, and indubitable', 'convincing', 'unequivocal', etc." 17 Cycl. 771.

Conclusive evidence is that which is incontrovertible; that is to say, either not open or not able to be questioned. Wood v. Chapin, 13 N. Y. 509, 515, 67 Am. Dec. 62. Where it is said that a thing is conclusively proved, it means that that result follows from the facts shown as the only one possible. People v. Stephenson, 11 Misc. Rep. 141, 32 N. Y. Supp. 1112, 1114. Conclusive proof means either a presumption of law, or evidence so strong as to overbear everything to the contrary. Haupt v. Pohlmann, 24 N. Y. Super. Ct. 121, 127.

(3) In a civil action the complainant is never bound to do more

than sustain his case by a preponderance of the credible evidence. Louisville & Nash. R. R. v. Jones, 83 Ala. 376, 3 South. 902; Ford v. Chambers, 19 Cal. 143; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Williams v. Watson, 34 Mo. 95; Stearns v. Field, 90 N. Y. 640; Crabtree v. Read, 50 Ill. 206; McDeed v. McDeed, 67 Ill. 545; Graves v. Colwell, 90 Ill. 612. To instruct a jury that they must be conclusively convinced is a manifest error. Hiester v. Laird, 1 W. & S. (Pa.) 245.

(4) In the case in hand it was only necessary for the petitioners to show by a preponderance of proof that the rate in the past—as it was found by the Commission that it would be for the future—was not a just or reasonable rate; and, if they did this, it was all that could be required of them. No doubt the Commission had the right to call for proof that was reasonably convincing. But it had no right to array itself against that which was produced, to the extent of holding that it was not conclusive; which was in effect saying that nothing short of what was incontrovertible would satisfy it.

Nor can this be passed over as an inadvertence or as meaning no more than that the evidence so far as concerned the past was not satisfactory. If this was all there was to the case, of course nothing could be made of it. But by the petition for a rehearing and the argument that was made in that connection the attention of the Commission was directly called to the effect of the ruling, and after due consideration it was adhered to. If therefore the matter was left in any doubt by the original report, there can be none by the later one. By the express reiteration of the former ruling it was thereby declared, not that the evidence was not satisfactory or unconvincing, but that it was not conclusive, and that none other would be sufficient. This was asking more of the petitioners than was warranted, and the action of the Commission in refusing reparation as to the past upon that ground is invalid.

The demurrer is overruled with leave to respondents to answer over.

NEAL v. RAILWAY CO.

129 Iowa 5. (1905)

Action to recover damages for the death of plaintiff's intestate alleged to have resulted from injuries received by him while in defendant's employ as switch tender, and to have been due to defendant's negligence. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

McCLAIN, J. The appellant's contention is that the trial court erred in overruling a motion to direct a verdict in its favor and in submitting to the jury the question whether the deceased was injured by reason of defendant's negligence, assuming that there was evidence tending to show negligence on the part of defendant in having defective blocking between the rails at the switch where deceased was injured; and the sole question argued is as to whether there is sufficient evidence to support a verdict for the plaintiff.

The evidence relied upon for the plaintiff as tending to show that the accident was the result of defendant's negligence was to the effect that the wooden blocking between the movable rail and the stationary rail at the north side of this switch was loose, so that it would press down with the weight of a person stepping upon it and allow the foot of such person to be caught between the two rails which were separated about five inches when the switch was open, as at the time of the accident. This piece of wooden blocking was three or four feet long, the eastern end about eight or ten feet from the point of the switch. The theory of counsel for plaintiff is that the deceased caught his right foot between the rails as a result of stepping on the eastern end of this blocking and was thus held until the car ran over or against him; and, as supporting this theory, they rely upon evidence that the right shoe and overshoe of deceased were torn open at the heel from the vamp upward and his shoestring was broken, and, also, that a piece of the trousers of deceased and a portion of his right kneecap were found next morning forced in betwen the ball of the north rail and the wooden blocking which was bolted on the inside thereof, between the ball and the base at the west end of the blocking, which has just been described as filling the space between the two rails. This is the only evidence in the record which can be claimed in any way to directly support the theory that the accident was due to the defective blocking.

The burden was on the plaintiff to establish, not only that the defendant was negligent in having a defective blocking between the rails

at this switch, but also that the injury to deceased resulted from this defect. It is conceded that the connection between the defect and the injury was established, if at all, only by circumstantial evidence. "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true and yet they may have no tendency to prove the theory. This is the well-settled rule." Asbach v. Chicago, B. & Q. R. Co., 74 Iowa, 251. If other conclusions may reasonably be drawn as to the cause of the injury from the facts in evidence than that contended for, the evidence does not support the conclusion sought to be drawn from it. Verdicts must have evidence to support them, and the jury will not be permitted merely to conjecture how the accident occurred. In matters of proof they are not justified in inferring from mere possibility the existence of facts. Wheelan v. Chicago, M. & St. P. R. Co., 85 Iowa, 167. If it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, they do not support the theory contended for. Rhines v. Chicago & N. W. R. Co., 75 Iowa, 597.

We reach the conclusion that the evidence does not tend to support the claim that the accident resulted from deceased's foot being caught by reason of the defective blocking, and on no other theory could the verdict of the jury under the instructions have been for the plaintiff. The jury are not permitted to find material facts without evidence, or on mere conjectures as to the truth of one of two or more equally probable or possible theories having different legal results. Reynolds v. Burgess Sulphite Fiber Co., (N. H.) 59 Atl. Rep. 615.

The judgment of the trial court is therefore reversed.

WARD v. NEW YORK LIFE INSURANCE CO.

225 N. Y. 314. (1919)

Appeal from judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 17, 1919, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

HISCOCK, Ch. J. The New York Life Insurance Company issued a policy on the life of one Ward in the sum of $5,000, payable on death of the insured to his executors, administrators or assigns. The policy also contained a provision that the insured might at any time change the beneficiary under said policy by written notice and indorsement of the change on the policy by the company. When Ward died opposing claimants to the proceeds of the policy appeared. One side were his sons who a short time before his death had been duly designated and by the company recognized as beneficiaries under the policy. On the other side appeared the wife who claimed the proceeds of the policy under an equitable parol assignment for value antedating the designation of the beneficiaries. The company paid the proceeds into court to be contested for by the opposing claimants and judgment has thus far proceeded in favor of the beneciaries as against the alleged assignee.

While there is no claim that the designation of the defendant beneficiaries was for a valuable consideration, there is on the other hand no question that their designation was made in proper form. The claim of the appellant to an assignment of the policy rests entirely on parol testimony. Two witnesses gave evidence to the effect that the insured had in substance stated that he had made an assignment of his insurance to his wife. The main testimony, however, to sustain the alleged assignment was given by the wife herself who first testified that on one occasion some time before her husband's death, when he desired to borrow some money from her he stated in substance that he would execute as security for new loans assignments of life insurance policies, which it may be inferred included the present one, and that thereupon she loaned him some money. In subsequent testimony, however, she varied her account of this interview and testified to statements then made by her husband which were in conformity with those said to have been made by him at various subsequent times and which were to the effect that he had assigned his life insurance policies to her, that she did not need be afraid to loan him money because she would be repaid or was secured by assignments of his insurance, etc. These statements, which are the ones relied upon on this appeal, were, therefore, to the effect that the insured had assigned to the appellant this life insurance or his life insurance policies, and she says that on the strength of these statements she from time to time loaned him various sums of money reaching in the aggregate a considerable amount. There is no other intelligible evidence tending to support the theory of an assignment.

As has been pointed out, the only evidence of assignment cited or

relied upon on this appeal consists of statements made by the insured that he had assigned his insurance to the appellant and we do not think that this may be sufficient to establish an assignment. It very likely may be that under some circumstances a borrower might make statements respecting a transfer of securities to a proposed lender upon which the latter would be entitled to rely in making loans. But that does not seem to be this case. The appellant could not have been misled by the statements of her husband and there is no element of estoppel involved by virtue of which equity will treat as having been done that which ought to be done. The appellant knew whether an assignment had been made. She was not deceived by her husband's statements. She knew that he had never executed and delivered to her any written assignment of the insurance policy; that he had never in appropriate and effective language made a present transfer of the policy by parol to her; that she had never had possession of the policy, and that he had never done anything to, by or with her, symbolically or otherwise, to give her control of the policy. She had never given to or received from the insurance company any notice indicating transfer of ownership to her and she had no assurances that the insured was not exercising control and ownership over the policy as in fact he did do. Under these circumstances it seems to us that the loose, general statements by the insured that he had made a transfer of the policy were not sufficient evidence to establish even an equitable parol assignment to the appellant.

We are not adopting this view on the theory that because this assignment is claimed to have been made by a dead person it can only be established by a different kind and quality of evidence than would be sufficient if the transaction were alleged to have been with a living person, and for which theory support is sometimes supposed to be found in what was said in Rousseau v. Rouss, (180 N. Y. 116); Hamlin v. Stevens, (177 N. Y. 39); Wallace v. Wallace, (216 N. Y. 28) and other similar cases. The rule in any civil case is that the plaintiff must establish his claim by a fair preponderance of evidence. He need do no more than this if his claim deals with a dead person; he cannot do less if he is attacking the rights and property of a living person. The general rule as to weight and quality of evidence is no different in one case than in the other. In applying the rule and test to specific evidence, however, it very likely will and should occur that the triers of fact will more carefully and critically scrutinize evidence offered against a dead person's estate for the purpose of deciding whether it does make the necessary weight and preponderance of evidence, than

would be done if the testimony was offered against one who was alive to contradict it. This is what we construe the expressions in the opinions to which we have referred to mean. As was said by Judge Crane in McKeon v. Van Slyck (223 N. Y. 392, 397), writing upon this subject: "In civil cases a plaintiff is never required to prove his case by more than a preponderance of evidence. This is as true of actions against an executor, founded on claims put forward for the first time after the death of the testator, as it is of other actions. No doubt in determining whether the preponderance exists, the triers of the facts must not forget that death had then sealed the lips of the alleged promisor. They may reject evidence in such circumstances which might satisfy them if the promisor were living. They must cast in the balance the evidence offered upon the one side and the opportunities for disproof upon the other. They may, therefore, be properly instructed that to make out a preponderance the evidence should be clear and convincing. But all these instructions in the last analysis are mere counsels of caution."

Our conclusion is that measuring appellant's case by the ordinary and standard rules she failed as matter of law to produce evidence which would have permitted the court to find that an assignment had been made. (Wallace v. Ingersoll, 89 N. Y. 508, 521; Rupp v. Blanchard, 34 Barb. 627, 629; Holmes v. Evans, 129 N. Y. 140, 145; N. W. Mut. Life Ins. Co. v. Wright, 153 Wis. 252; Richardson v. White, 167 Mass. 58; Bowers v. Johnson, 49 N. Y. 432, 434; Cuyler v. Wallace, 183 N. Y. 291; Donovan v. Middlebrook, 95 App. Div. 365.

For these reasons we think the judgment should be affirmed, with costs.

COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur; CHASE, J., concurs in result; CARDOZO, J., not voting.

Judgment affirmed.

ROBERGE v. BONNER.

185 N. Y. 265. (1906)

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 26, 1904, affirming a judgment in favor of defendants entered upon a verdict and an order denying a motion for a new trial.

PER CURIAM. This action is founded upon an alleged verbal agreement under which the plaintiff claims that the defendants' testator promised to pay him the sum of $100,000 during the lifetime of the testator, or to leave him that sum in his will, as compensation for services alleged to have been rendered in the capacity of a veterinary surgeon. The jury rendered a verdict in favor of the defendants, and upon appeal the judgment entered upon that verdict was affirmed by the Appellate Division.

Since it is practically conceded that there was sufficient evidence upon the general issue to justify the verdict rendered, the only questions open for consideration on this appeal arise upon two exceptions. The first relates to the exclusion of certain evidence, and the second to a portion of the trial court's charge made in response to a request of defendants' counsel.

(1) As to the first exception which arises upon the exclusion of certain entries made by the testator in a diary which he kept, and which the plaintiff relies upon to corroborate his evidence as to the contract alleged to have been made, it is sufficient to say that an examination of these entries discloses clearly that they in no way tended to prove the alleged agreement, and the ruling, therefore, did no harm.

(2) At the conclusion of the charge in chief the counsel for the defendants made the following request: "Your Honor also used the expression that the plaintiff must satisfy the jury by a fair preponderance of evidence of the justice of his claim. My contention is that he must satisfy them by clear, conclusive and convincing evidence of this character." To this the learned trial judge replied: "I do not object to charging that. If not so understood I will tell the jury that was my intention. The proof must be clear, convincing and conclusive in your minds. I will so charge." It is doubtless true that in complying with this request the court committed a technical error, since this portion of the charge went beyond the rule as to the degree of evidence required to justify or support a verdict in a civil case, the rule being in such a case that the jury must be satisfied by a fair preponderance of the evidence. It was in the light of this rule, and to emphasize its extent as well as its limitations, that Judge Vann, in writing for this court in a recent case involving an unusual contract and open to suspicion, said: "We have repeatedly held that such a contract must not only be definite and founded on an adequate consideration, but also that it must be established by the clearest and most convincing evidence." (Rosseau v. Rouss, 180 N. Y. 116, 121.) The language quoted clearly defines the rule applicable to such a case as this. Proof

may be required to be clear and convincing without transcending the rule of preponderance. But the word "conclusive" has a larger meaning, and, when used in connection with the evidence required to prove a given fact, calls for a much higher degree of proof than has ever been held to be necessary in a civil action.

We are not satisfied, however, that this error was of such a substantial character as to require a reversal of the judgment herein. When the passage of the charge referred to is considered in connection with that part of the charge in which the learned trial judge had fairly and correctly laid down the rule in such cases, it is quite evident that the jury could not have been misled. Referring to this rule of evidence the trial court instructed the jury as follows: "The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a fair preponderance of evidence as to the justice of his claim. What we mean by the fair preponderance of evidence is this: Preponderance refers to something that may be weighed. Of course, we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of the plaintiff and on the other side the testimony of the defendant and say which one outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible. The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendants, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant; that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant."

More might be quoted from the charge to show that the trial court most cogently and clearly impressed upon the minds of the jury their duty to weigh the evidence of the respective litigants and that their verdict must follow the preponderance of the evidence. Under these circumstances we think the error in the charge complained of is more technical than substantial, and therefore, the judgment herein should be affirmed, with costs.

HAIGHT, VANN, WERNER and HISCOCK, JJ., concur; CULLEN, Ch. J., and O'BRIEN, J., not voting; WILLARD BARTLETT, J., taking no part.

Judgment affirmed.

HARTMAN BREWING CO. v. CLARK.

94 Md. 520. (1902)

McSHERRY, C. J., delivered the opinion of the court.

On the twenty-sixth day of January, nineteen hundred and one, Eugene Clark executed and delivered to his wife, Kate Clark, a bill of sale of certain personal property in consideration of an alleged antecedent indebtedness due by the husband to the wife. On the eighteenth day of February following the appellant, The Hartman and Fehrenbach Brewing Company, caused an execution to be issued on a judgment which the company had obtained against Clark on December the eighteenth, eighteen hundred and ninety-nine; and the sheriff of Cecil County levied on the personal property described in and covered by the above-mentioned bill of sale. Thereupon Mrs. Clark filed a claim of property and the judgment debtor and creditor were summoned to answer the claim. The judgment creditor interposed several pleas. Those pleas put in issue the wife's alleged ownership of the property levied on and asserted that the bill of sale was fraudulent and void. The issues thus made went to trial before a jury. Evidence was offered by the claimant tending to show that the transfer of the property by the husband to the wife was *bona fide* and for a valuable consideration, and that it had not been made with intent to hinder and delay the creditors of the husband. On the part of the judgment creditor evidence was adduced tending to prove precisely the contrary. At the close of the evidence each side asked instructions to the jury. Without setting forth the several prayers at length it will suffice to say that the point of divergence between them is sharply and distinctly marked; and has relation, not to the legal sufficiency, but to the character of the evidence entitling the claimant to a verdict. Both sides agree as to the substantive law of the case. Both agree that if the transfer from the husband to the wife was not *bona fide*, or was made without consideration, the claimant is not entitled to recover. But they differ as to the quality of the evidence necessary to support the claim of property. The prayer presented in behalf of Mrs. Clark concedes that it was incumbent on her to establish the relation of debtor and creditor between her husband and herself; whilst those offered by the appellant insist this relation must be proved "by the clearest and most satisfactory evidence."

By the second, third and fourth prayers of the judgment creditor the trial court was asked to rule that before the claimant could re-

cover a verdict there must be "the clearest and most satisfactory evidence," or, "evidence of the clearest and most satisfactory character" that the relation of debtor and creditor existed between the husband and the wife when the bill of sale was made. In the first prayer granted at the instance of the judgment creditor the court instructed the jury that the claimant could not sustain her claim unless she established by "preponderating testimony" that the bill of sale had been given for a valuable consideration and had been made in good faith. The verdict of the jury was in favor of the claimant, Mrs. Clark, and from the judgment entered on that verdict the creditor of the husband has appealed. The error assigned is that the court refused to instruct the jury that the claimant must show "by the clearest and most satisfactory evidence" the existence of the relation of debtor and creditor between the husband and the wife at the time of the execution of the bill of sale.

The phrase "the clearest and most satisfactory evidence" has been taken from an opinion of this court in Stockslager v. Mechanics Loan Inst., 87 Md. 235; and the contention is that by its use in that case this court established a rule of law as to the quality or character of the evidence required to be adduced by the wife in cases of this kind to sustain a conveyance to her by her husband when that conveyance is assailed by a pre-existing creditor of the husband. In the case above referred to this court was dealing with both the law and the facts in an equity proceeding, and in dealing with both and therefore with the sufficiency of the evidence and its probative value, it was said that the wife could not sustain her title to the property acquired from her husband in prejudice of the rights of his creditors except by the clearest and most satisfactory evidence. But it will be observed that this was laying down no new rule of law; nor was it formulating any special rule of evidence as applicable to this particular class of cases. In dealing with the whole evidence—its weight and legal sufficiency—it was entirely proper to say that the evidence to support the wife's title must be the clearest and most satisfactory; but how could it be possible to convey to the minds of jurors any definite or adequate notion of the sufficiency of evidence to prove an issue, if they were told that the claimant must establish her case "by the clearest and most satisfactory evidence?" Can it be assumed that the jurors know what is the clearest and most satisfactory evidence to establish any asserted fact? If they were told that they could not find for the claimant except upon the clearest and most satisfactory evidence, without defining to them what was meant by those terms, would not the instruction be

most misleading and, therefore, clearly erroneous? What is and what is not the clearest and most satisfactory evidence is essentially a relative question, and a relative question of law and not of fact. A court in weighing facts which it has to pass on may well use the expression, because the expression as thus used conveys a definite meaning; but when a jury is instructed that they are confined to the clearest and most satisfactory evidence without a suggestion as to what is meant by the terms, confusion and uncertainty will inevitably result. If the judgment creditor thought that the evidence adduced by the claimant was not legally sufficient to sustain Mrs. Clarke's claim of property because not the clearest and most satisfactory evidence that could have been presented, the judgment creditor could have procured a ruling on that proposition by asking an instruction that there was no legally sufficient evidence to entitle the claimant to a verdict. The legal sufficiency which, of course, includes the probative value of the evidence, would have been called on to scrutinize it and to determine whether it was the clearest and most satisfactory evidence to establish the fact to prove which it had been offered. Such a course would have been widely different from allowing a jury to speculate and grope about without a guide or direction, in a vain attempt to find what was the clearest and most satisfactory evidence.

For the reasons we have given we think the Circuit Court was clearly right in its rulings on the prayers and the judgment appealed against will be affirmed.

Judgment affirmed with costs above and below.

MERRILL v. THOMPSON.

252 Mo. 714. (1913)

WOODSON, P. J. This was a bill in equity instituted in the Circuit Court of Livingston County, by the plaintiffs against the defendants, to quiet title, but in reality, to specifically enforce an oral contract alleged to have been entered into by and between Harriett A. Merrill, nee Thompson, and her sister Sophia, with Nathan Thompson, their father, whereby he agreed to convey to them a certain forty acres of land situated in said county, and particularly described in the bill, in consideration that the former agreed to live with, care for, support

and maintain him and his wife, their mother, during their natural lives; Harriett, alleging and claiming that she, prior to the institution of the suit, purchased the interest of her sister Sophia, and that she intermarried with her co-plaintiff, William T. Merrill.

A trial was had and the court found the issues as to the contract (title also having been alleged to have been acquired by the Statute of Limitation) in favor of the plaintiffs (there being no finding either way as to the claim of title by adverse possession), and in due time and in proper manner defendant duly appealed the cause to this court.

Before considering this assignment of errors we will dispose of a general objection urged by counsel against the correctness of the decree, and that is, that "the proof to sustain the alleged contract is based solely upon the evidence of Fountain K. Thompson, a brother of the plaintiff," and, therefore, the evidence is insufficient to sustain the decree.

If we correctly understand this contention it challenges the sufficiency of the strength of the testimony of any one witness to support a judgment or decree in a case of this character regardless of his intelligence, character and standing in the community for honesty, truth and veracity.

Even if this insistence was based upon undisputed facts (which it is not, for he is strongly corroborated by almost every physical and undisputed fact in the case, which facts are many, as will be presently noted), we would be unable to lend our concurrence thereto, for the simple reason that the weight and convincing character of testimony does not depend so much upon the number of witnesses who testify in a cause, but more upon the intelligence, honesty and veracity of those who give evidence in a cause.

This rule has been so long and so firmly established in our system of jurisprudence, it would be more than a useless waste of time and energy to cite authority in support thereof.

We, therefore, rule this insistence against appellant.

Finding no error in the record, the judgment of the Circuit Court is

Affirmed.

GAGE v. EDDY.

179 Ill. 492. (1899)

MR. JUSTICE CRAIG delivered the opinion of the court:

This was an action of ejectment brought by William H. Eddy against Henry H. Gage, to recover the south twenty acres of the north half of the east half of the northwest quarter section 28, township 38, north, range 14, east, in Cook County. The action was brought in 1889, and the first trial was had in April, 1892, when the Circuit Court instructed the jury to find for the defendant. On appeal we held the instruction was erroneous and reversed the judgment. (Eddy v. Gage, 147 Ill. 162.) A second trial resulted in a verdict and judgment in favor of the plaintiff, but upon appeal the judgment was reversed on account of an error in the exclusion of certain evidence. (Gage v. Eddy, 167 Ill. 102.). A third trial resulted in a verdict and judgment in favor of the plaintiff, to reverse which the present appeal is prosecuted.

Objection is made to instructions 1, 2, 3, 4 and 5 given for the plaintiff. These instructions are substantially like the ones given in Sullivan v. Eddy, 154 Ill. 199, and which were approved in that case.

The eighth instruction is also criticised. It is as follows:

"The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testified. In order to determine that question the jury must be governed by and take into consideration the appearance and conduct of the witnesses while testifying; the apparent truthfulness of their testimony or the lack of it; their apparent intelligence or the lack of it; their opportunity of knowing or seeing the facts or subjects concerning which they have testified, or the absence of such opportunity; their interest or the absence of interest in the result of the case; and from all these facts as shown by the evidence, and from all the other facts and circumstances so shown, the jury must decide on which side is the preponderance. After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent, the better informed the more credible and the more disinterested witnesses, whether these are the greater or the smaller number. But the jury have no right

to disregard capriciously the testimony of the larger number of witnesses, nor to refuse to give whatever consideration, in their judgment, should attach naturally to the fact that the larger number testify one way. The element of numbers should be considered, with all the other elements already herein suggested, for whatever in the judgment of the jury that element is worth, and the evidence of the smaller number cannot be taken by the jury in preference to that of the larger number unless the jury can say, on their oaths, that it is more reasonable, more truthful, more disinterested and more credible."

We perceive no substantial objection to the instruction. The appellant called more witnesses than the plaintiff, and the instruction informed the jury that they had no right capriciously to disregard the testimony of the larger number of witnesses. Surely the jury could not have been misled by anything contained in the instruction.

We are satisfied that the judgment of the Circuit Court is correct, and it will be affirmed.

Judgment affirmed.

KIRCHNER v. COLLINS.

152 Mo. 394. (1899)

GANTT, P. J. This is an action by plaintiff for alleged services rendered to him by defendant as an architect in drawing certain plans and specifications for an apartment building in the city of St. Louis, at the corner of Lindell boulevard and Vandeventer avenue.

The issues of fact before the jury were, whether the services whose value was sued for, were rendered to defendant Collins or to said Truitt, and whose testimony should be credited by the jury, Truitt's or defendant's.

The verdict was for defendant and plaintiff appeals.

The second instruction for defendant is also challenged for the use of the word "fair" in connection with the word "preponderance." That instruction is as follows:

"The court instructs the jury that the burden of proof is upon the plaintiff to maintain the issue in this case on his part, by a fair preponderance of evidence as to whether or not the plaintiff was employed by the defendant to perform the services sued for and testified to by the plaintiff; and unless the jury believe from the evidence that the

plaintiff has so maintained the said issue, they will find a verdict for the defendant."

It is earnestly insisted that this qualification of the word preponderance is reversible error.

The rule that a jury should find in favor of the preponderance of the evidence is very old and the addition of words of qualification such as "clear", "satisfactory" and "fair" should be avoided lest they be construed by the jury as requiring a higher degree of proof than is furnished by the preponderance alone.

In this case most learned counsel have favored us with different constructions to be placed on the word "fair."

While it is to be avoided we are not disposed to view it under the circumstances of this case as reversible error and we can find no case where it has been regarded of such weight. On the contrary it has been expressly ruled insufficient to work a reversal in our sister State of Texas. (McBride v. Banguss, 65 Tex. 174; Adams v. Eddy, 29 S. W. Rep. 180; Gabell v. Menczer, 35 S. W. Rep. 206.)

The judgment is affirmed. BURGESS, J., concurs; SHERWOOD, J., absent.

KNOP v. NATIONAL FIRE INS. CO.

107 Mich. 323. (1895)

Assumpsit by August Knop against the National Fire Insurance Company of Hartford, Connecticut, on a fire policy. From a judgment for plaintiff, defendant brings error. Reversed.

GRANT, J. This is an action to recover for loss by fire upon a policy of insurance which covered $300 on a one-story dwelling house, and $300 on household furniture and other contents. The principal defense was that the plaintiff had made a false statement under oath of the amount of the loss, and that he himself set the fire with intent to defraud the defendant.

1. The Circuit Court instructed the jury as follows:

"Now I come to a very important question. It is called in law 'fraud'. Fraud is a trick, a deceit, a device, whereby one misleads another to do something to his prejudice. In law, however, it is not to be presumed. It is not even to be guessed at, and not arrived at by slight circumstances. It must be proven the same as any other

substantial fact in the case. The burden of proving fraud is upon the one that claims it—the one that charges it—because it is out of the ordinary. It may be proven by circumstantial evidence; but if proven by circumstantial evidence, the rule of circumstantial evidence being a rather strict one, it must be proven with force and conclusiveness to this degree—that all the circumstances (where circumstances are relied upon to make the proof) must point to the one thing claimed, and admit of no other reasonable explanation. That is the rule always for circumstantial evidence—that this must always converge or direct your mind between the points, and not admit of any other reasonable explanation."

The error in this charge is manifest. It virtually instructed the jury that the defense must be established beyond a reasonable doubt. Morley v. Insurance Co., 85 Mich. 219. In that case the erroneous instruction was as follows: "Proof of fraud should be of such a character as to be inconsistent with any other view than that Mr. Lenhoff was guilty of fraud." In the present case the court instructed them, in substance, that the facts relied upon to show fraud must not admit of any other reasonable explanation. It is perhaps fair to the jury in this case to say that they must have understood this instruction to mean that they must find the fraud proven beyond any reasonable doubt, for they were not controlled in their verdict by the clear preponderance of the evidence. The above instruction was given near the close of the charge, and there is no other language in it to explain or modify it. The charge, in fact, is entirely silent as to the preponderance of evidence.

LONG, J. We concur with Mr. Justice Grant on the first point in his opinion, and for that reason a new trial must be granted.

MCGRATH, C. J., MONTGOMERY and HOOKER, JJ., concurred with LONG, J.

GRELLA, Admin. v. LEWIS WHARF CO.

211 Mass. 54. (1911)

Three actions of Tort, the first by Marciano Grella as administrator of the estate of his child Margherita Grella, under R. L. c. 171, sec. 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, a girl fourteen months old, by negligently failing to keep in

repair a balustrade or railing on the second floor of a tenement building of the defendant numbered 259 on North street in Boston, the second action, brought also as administrator, to recover for conscious suffering of the plaintiff's intestate, and the third action by the plaintiff personally for expenses incurred by reason of the injury and death. Writs dated July 17, 1908.

DECOURCY, J. The deceased, a child fourteen months old, fell through an opening caused by broken banisters in a tenement house of the defendant, and struck on the floor below. These actions are brought, one for her death, one for her conscious suffering, and the third for the medical and funeral expenses.

1. The defendant's first request, that upon all the evidence the plaintiff cannot recover, was rightly refused. The defendant was the landlord of the plaintiff Marciano Grella and retained control of the common hallway where the accident happened. This opening in the balustrade was made after the tenancy began, had remained unguarded for two or three months before the accident, had been called to the attention of the defendant's agent and could have been repaired at a trifling expense. That this constituted sufficient evidence of negligence is not questioned by the defendant. Faxon v. Butler, 296 Mass. 500.

But it is urged that the plaintiff has not sustained the burden of showing due care. The deceased was a child of such tender years that she was incapable of exercising care, and this issue must be determined by the conduct of those in charge of her. The mother testified that she entrusted the child to the custody of Angelina Cardarelli, the fifteen year old daughter of a neighboring tenant, who had taken care of the little one on other occasions; and the case apparently was tried on the assumption that Angelina's due care must be shown. Norris v. Anthony, 193 Mass. 225.

The judge was right in refusing to give the third request that the mother's due care in the death case must be proved beyond a reasonable doubt. The history of our statutes authorizing recovery for death caused by negligence was thoroughly reviewed in the recent cases of Hudson v. Lynn & Boston Railroad, 185 Mass. 510, and Brooks v. Fitchburg & Leominster Street Railway, 200 Mass. 8, but the question now raised was not discussed. The only remedy provided in death cases was by indictment until St. 1881, c. 199, first introduced a civil action in cases against common carriers and towns. When the statutes were revised in the Public Statutes of 1882, the indictment form of remedy was left out of the laws relating to highways and common

carriers, although retained in those concerning railroads and street railways. Pub. Sts. c. 52, § 17; c. 73, § 6; c. 112, §§ 212, 213. In 1886 (c. 140) an action of tort was allowed against street railways in case of the death of persons other than employees. The employers' liability act of 1887 (c. 270) provided a civil remedy for the instantaneous death of an employee, and this was extended to cases of death after conscious suffering by St. 1892, c. 260. St. 1897, c. 416, relating to gas and electric light corporations and St. 1898, c. 565, extending liability to all individuals and corporations for the death of persons not in their employ, contain no provision for an indictment. This last statute was re-enacted in R. L. c. 171, § 2, and under it (as amended by St. 1907, c. 375) the present action was brought. It is apparent from this review that the liability created by the statute in question is one for which the only form of remedy is a civil proceeding, and presumably the rules of civil procedure are applicable.

Generally the rule of evidence requiring proof beyond a reasonable doubt in criminal proceedings does not apply to civil actions even when they arise from an act which is penal in its nature. Thus in complaints under the bastardy statute, it is sufficient to prove the charge by a preponderance of the evidence. Richardson v. Burleigh, 3 Allen, 479. Young v. Jakepeace, 103 Mass. 50. So in an action to recover a forfeiture for the sale of intoxicating liquor to a minor, the rule requiring proof beyond a reasonable doubt does not apply. Roberge v. Burnham, 124 Mass. 277. So also in an action on a policy of insurance the defendant is not bound to prove beyond a reasonable doubt that the fire was occasioned by the wilful and fraudulent act of the plaintiff. Schmidt v. New York Union Mutual Fire Ins. Co., 1 Gray, 529. And see Gordon v. Parmalee, 15 Gray, 413; Anderson v. Edwards, 123 Mass. 273; 4 Wigmore on Evidence, § 2498. Whether St. 1907, c. 375, be considered as essentially a remedial and remunerative statute or as a penal one, the action brought under it has the elements and characteristics of a civil rather than a criminal proceeding. As was said by C. Allen, J., in Kelley v. Boston & Maine Railroad, 135 Mass. 448, 449: "The civil action differs in important particulars from the remedy by indictment. The latter is not available as a matter of right, but is a remedy in the name of the Commonwealth, dependent upon the action of the grand jury, and to be enforced by or under the direction of a public officer, and according to the forms of criminal proceedings. The civil action may be instituted by the executor or administrator of the deceased person of his own motion; the trial will be before the court, without a jury, unless a jury

trial is demanded by one of the parties; in case of trial by jury, the damages are to be assessed by the jury; the burden of proof will be sustained by proving the issue by a preponderance of evidence; and the plaintiff will recover or be liable to costs, as the result of the case may be."

The charge on the question of due care was ample and correct.

BAUR GROCERY CO. v. SANDERS & HENRICH.

74 Mo. App. 657. (1898)

BOND, J. Plaintiffs are creditors of Mary E. Sanders and Charles Henrich, as copartners under the firm of Sanders and Henrich, and on the twenty-third of March, 1897, plaintiffs brought an attachment suit for $457.04 and caused the writ to be levied upon certain merchandise as belonging to their said debtors. The property was sold by order of the court. Thereafter B. H. Sanders interpleaded in the cause and alleged that he was the owner of the attached property. Upon issues attacking his title for fraud, the case was tried, and after a verdict in his favor, a judgment "of restitution of the property in controversy" was entered, from which plaintiffs appealed to this court.

The first instruction given for interpleader, over plaintiffs objection, is, to wit:

"The court instructs the jury that fraud is never presumed, but must be clearly proven to entitle a party to relief on the ground of fraud, and the presumption of law is that the business transactions of every man are done in good faith and for an honest purpose, and anyone who alleges that such acts are done in bad faith or for a dishonest purpose takes upon himself the burden of showing, by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith."

This instruction is "clearly" erroneous. It violates the fundamental governing the triers of the fact in purely legal actions, which is, that is sufficient to entitle a party having the affirmative of an issue to a verdict that the facts and circumstances tending to prove the proposition asserted by him should outweigh the evidence to the contrary. When the equilibrium of proof is destroyed, it matters not how slightly, the jury in a civil action are warranted in rendering a verdict in favor

of the side to which the beam tilts. In strictly legal actions, fraud, like any other fact, may be established by a mere preponderance of the evidence, and the issue as to fraud must be submitted to the jury whenever it is inferable from all the evidence and circumstances characterizing the transaction. State to use v. Mason, 112 Mo. Coc. cit. 382. Contrary to these principles the court in the instruction under review in effect told the jury that to entitle plaintiff to relief on the issue of fraud, it must be clearly proven, thereby making the verdict of the jury depend not on the preponderance of the testimony, but upon a degree of proof implied by the terms "clearly proven", which terms signify a greater degree of proof than is implied in mere preponderance of the evidence. This is not the law. Marshall v. Ins. Co., 43 Mo. 586, affirmed in Edwards v. Knapp, 97 Mo. 432. As this conclusion necessitates the reversal of this case, it is unnecessary to discuss the other objections urged by appellant. It may be well, however, to call the attention of the court to the fact that the judgment rendered in this case was erroneous in so far as it ordered the return of the property which had already been disposed of under the orders of the court. The judgment is reversed and the cause remanded.

All concur.

DECKER v. SOMERSET INS. CO.

66 Me. 406. (1877)

Case upon an insurance policy against fire.

The verdict was for the plaintiff and the defendants alleged exceptions.

WALTON, J. This case is before the law court on motion and exceptions. It is an action on an insurance policy against fire. One ground of defense is that the fire was willfully set by the plaintiff himself, or by his procurement.

The presiding judge instructed the jury that in order to establish this defense, they must find that it had been reasonably established; that is, that it had been established to their reasonable satisfaction; that they were to require more evidence than they would to establish payment of a note, or prove an account in set-off; that they would consider the gravity of the charge, and require stronger proof of its truthfulness than they would in ordinary cases arising out of matters of

contract. Such was the substance of the charge upon this point; and it is claimed that it must have given the jury to understand that something more than a mere preponderance of evidence was necessary to establish the defense, and was therefore erroneous. We think the objection is not sustained. Certainly the judge did not say in so many words that anything more than a preponderance of evidence was necessary. Nor do we think it is implied in what he did say.

To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings, should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in set-off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Ellis v. Buzzell, 60 Maine, 209. Knowles v. Scribner, 57 Maine, 495.

Motion and exceptions overruled.

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

ROBERGE v. BURNHAM.

124 Mass. 277. (1878)

Tort to recover a forfeiture of $100, under the St. of 1875, c. 99, No. 15, for selling intoxicating liquor to John Roberge, a minor son of the plaintiff. At the trial in the Superior Court, before Pitman, J.,

the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, the material parts of which appear in the opinion.

MORTON, J. The statute under which this action is brought provides that "whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor in an action of tort." St. 1875, c. 99, No. 15. It was the plain purpose of the Legislature to make a person, who, like the defendant, keeps a place for the sale of intoxicating liquor, responsible to the parent or guardian if he, or an agent or servant in his employ, sells liquor to a minor. It does not make knowledge or guilty intent one of the elements of his liability. As in the analogous case of the keeper of a billiard room or table, he is required to see at his peril that liquor is not sold to a minor, either by himself personally or by his agents or servants. Commonwealth v. Emmons, 98 Mass. 6. The facts, therefore, which the defendant offered to prove, that his agent who made the sale to the minor, John Roberge, did not know that he was a minor, and that the defendant had instructed his agent not to sell to minors, were immaterial; and the judge rightly ruled that, if the jury were satisfied that the person making the sale was the agent of the defendant, and acting within the general scope of his agency, the defendant would be liable, though the agent was violating the particular instructions of his principal.

The defendant asked the court to instruct the jury "that their verdict should be for the defendant unless upon the evidence they were satisfied beyond a reasonable doubt that the defendant, by himself or his agent or servant, committed the offense of selling intoxicating liquor to a minor." The presiding judge refused this request.

The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained. 2 Russell on Crimes (7th Am. ed.) 727. It often happens that civil suits involve the proof of acts which expose the party to a criminal prosecution. Such are proceedings under the statute for the maintenance of bastard children, proceedings to obtain a divorce for adultery, actions for assults, actions for criminal conversation or for seduction, and others which might be named. And in such actions, which are brought for the determination of civil rights, the general

rule applicable to civil suits prevails, that proof by a reasonable preponderance of the evidence is sufficient. Richardson v. Burleigh, 3 Allen, 479. Young v. Makepeace, 103 Mass. 50. Anderson v. Edwards, 123 Mass. 273.

We are of opinion that the same rule applies in the case at bar. The penalty to which the defendant is liable can be recovered only in an action by the parent or guardian, and not by indictment or complaint under the Gen. Sts. c. 176, No. 2. The statute gives the plaintiff the right to maintain an action of tort, which is a civil action. It is an action given to the party aggrieved only, and is in the nature of a remedial suit. It has all the characteristics of a civil suit; it is begun by a writ in the usual form; it is at all times under the control of the plaintiff, at a term of the court for civil business; it is governed by the provisions of the practice; and an adverse judgment against the defendant could not be held to be a conviction of a crime which could be shown to affect his credibility as a witness. Levy v. Gowdy, 2 Allen, 320. Williams v. Taunton, 16 Gray, 288.

It is true that this action, like all penal actions, partakes somewhat of the character of punishment, but this does not make it a criminal prosecution. When the Legislature gives to the plaintiff a civil action, partly remedial in its nature, it is to be presumed that it is intended that the usual incidents of all civil actions should attach, one of which is that proof by a reasonable preponderance of the evidence is sufficient.

We are therefore of opinion that the judge properly refused to rule as requested by the defendant.

Exceptions overruled.

LONIS v. LAKE SHORE, etc., R. CO.

111 Mich. 458. (1897)

Case by Minor Lonis against the Lake Shore & Michigan Southern Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

GRANT, J. This case is the companion of McDuffie v. Railway Co., 98 Mich. 356. McDuffie was driving, and Lonis was riding in the same wagon with him. The issue in this case is the same as in the other, and the testimony the same, except some discrepancies between the

testimony of Lonis and McDuffie upon this trial and that given in the other case. All the propositions, except one, now urged by the learned counsel for the defendant, are substantially the same as were urged in that case. That decision is the law of this case, unless the defendant has now established facts which were not established in the former case. Just after the accident, both McDuffie and Lonis made written statements to the agents of the defendant detailing how the accident occurred. Those statements differed from their testimony given upon the trial. It was held in that case that this conflict was not so great as to justify the court in directing a verdict for the defendant on the ground of contributory negligence. We find no such conflict in the three versions of the accident as to justify the court in directing a verdict for the defendant on the ground of contributory negligence. We find no such conflict in the three versions of the accident as to justifying the court in saying that either McDuffie or Lonis was barred of recovery on account of this conflict. The jury, under proper instructions, were left to determine what credence they would give to the testimony of these parties.

One question which was not raised upon the McDuffie trial is now raised. The following request was preferred and refused:

"The jury are instructed that, as to the question of the giving of the signals—as to whether or not the whistle was blown and the bell rung—the difference between positive and negative testimony is very marked, and the positive testimony of witnesses who had opportunity to know that the signals were given should outweigh the testimony of witnesses who did not hear it, unless in some manner their attention had been called to it."

Five witnesses for the plaintiff swear positively that the signals were not given, and give their reasons why they so testified. One other witness, John Williams, testified that he was "looking right at the engine," and that he did not hear any bell or whistle. On cross-examination he said "he did not think he was thinking anything at all about any train coming; that his attention was not called directly as to whether the train whistled or whether it did not, although, being out of doors, he would have heard it, probably, if it had whistled; that he would hardly think the bell would ring without he noticed it at such a time as that—in fact, he was talking about it right away." On the part of the defendant, 18 witnesses testified positively that the signals were given. We do not think there was negative testimony to which the request would have been applicable. The only testimony to which that term could possibly be applied was that of Williams. But he said

that he was looking at the engine, was out of doors, and within hearing distance. It seems improbable, as he testified, that he would not have heard them under these circumstances. The situation before the jury was one of positive testimony against positive testimony, and their verdict depended upon which they believed. They have said by their verdict that they believed the 5 witnesses for plaintiff, and did not believe the 18 witnesses for the defendant. If there was any remedy for the defendant, it lay with the circuit judge, who saw the witnesses, and was better able than we are to determine whether the jury disregarded the rule as to preponderance of evidence, so as to justify him in granting a new trial.

The judgment is affirmed.

The other Justices concurred.

BURLES v. OREGON, etc., R. R. CO., et al.

49 Mont. 129. (1914)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was prosecuted by the administrator of the estate of Goldie May Burles, deceased, to recover damages alleged to have been suffered by her during her lifetime as the proximate result of defendant's refusal to stop train No. 3 at Barrett's Station on June 27, 1910, and carry her to Butte. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appealed.

Finally, it is insisted that the evidence is insufficient to justify the verdict. It is not controverted that plaintiff gave a proper signal to stop the train; but it is most earnestly urged upon us that the evidence is overwhelmingly preponderant that the engineer did not see it and could not have seen it under the circumstances of the case as narrated by the plaintiff, and that no answering signal was given. It is true that the engineer, the fireman, and brakeman on the train at the time each testified that the stop signals—two short blasts of the whistle—were not given, and the engineer, fireman, and two other employees of the company expressed opinions that a person in the situation of the plaintiff, dressed as he was, could not be seen for 1,000 feet, and that the engineer could not have distinguished that he was attempting to stop the train for more than "200 or 300 feet" (Hughes); "300 or 400 feet" (Palmer); "200 feet" (Hale); "350 or 400 feet" (Elwin). The

plaintiff testified that he was about 1,000 feet from the train when his signals were answered by the engineer. L. K. Adams, a witness for the plaintiff, testified that he had stopped this same train at Barrett's during April and May, by merely waving his hand, when the train was 1,050 feet away, and that his signal had been seen and answered. The preponderance of the evidence does not depend alone upon the number of witnesses who testify to a fact. The court very properly told the jury that, in determining upon which side was the preponderance of the evidence, they "should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial."

In view of the many facts and circumstances appearing upon this record which the jury might have considered as supporting plaintiff's story, and which they doubtless did consider in weighing the evidence given by the witnesses for the defendants, we cannot say that a different result should have been reached.

We do not find any reversible error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

PART VII.

TOPICS NOT PECULIAR TO EVIDENCE.

JUDICIAL NOTICE.[1]

UNITED STATES v. CHAVES.

159 U. S. 452. (1895)

This is an appeal on behalf of the United States from a decree of the Court of Private Land Claims, made on the 26th day of September, 1892, in the matter of the claim for certain lands in Valencia County, New Mexico, commonly called the "Cubero" land grant.

The case as presented in the pleadings is as follows:

It is claimed by the petitioners that in the year 1833 the Republic of Mexico, by Francisco Sarricino, the governor of the Territory of New Mexico, granted to Juan Chaves, and about sixty others, "and to the town of Cubero, whose establishment and incorporation were intended and declared by the terms of said grant," a tract of land now situated in the county of Valencia, New Mexico.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

A question is raised in the brief for the government whether the courts of the United States can take judicial notice of the laws and regulations of Mexico pertaining to grants made prior to the cession. It was said in Fremont v. United States, 17 How. 542, 557, referring to a similar question under the treaties with Spain, ceding territories to the United States, "it is proper to remark, that the laws of these territories under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a State of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages."

The same position was asserted in the case of United States v. Perot, 98 U. S. 428.

Affirmed.

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[1] Hughes on Evidence, p. 4.

MALONEY v. WINSTON BROS. CO.

18 Ida. 740, 757. (1910)

Action by the plaintiff for damages for personal injury. Judgment for plaintiff and defendant appealed. Judgment modified and affirmed.

AILSHIE, J. This action was prosecuted for the recovery of damages for personal injuries received by the plaintiff while working in what is known as the St. Paul pass tunnel, which was being cut through the Bitter Root mountains for the use of the Chicago, Milwaukee & St. Paul Ry. Co. The east end of this tunnel starts a short distance from the town of Taft, in Montana, while the west end of the tunnel is in Idaho. The plaintiff recovered judgment for $15,000 and defendant moved for a new trial and its motion was denied, and it has appealed from the judgment and order denying the motion.

The judgment will be affirmed to the extent of $10,000 on condition that the respondent file within thirty days after going down of the remittitur a waiver of the excess of $5,000 and an acceptance of the judgment as thus modified. On failure to do so the judgment will be reversed *in toto* and a new trial granted. Modified and affirmed accordingly, with costs in favor of respondent.

SULLIVAN, C. J., and STEWART, J., concur.

ON REHEARING.

(December 7, 1910)

AILSHIE, J. A rehearing was granted in this case, and the matter was argued exhaustively orally, and four separate briefs by different counsel have been filed on behalf of appellants, in which the questions of fact involved are discussed and the authorities bearing on the case have been exhaustively analyzed and considered.

The accident in this case occurred in the tunnel on the Montana side of the line between Idaho and Montana. It has been argued on the rehearing that under the statutes and decisions of Montana, a recovery could not be had in this case in Montana, and that it is accordingly the duty of this court to deny the respondent any relief. On the proposition that respondent could not recover in Montana, counsel cite two cases from the Supreme Court of that state—Cummings v. Teins Copper Co., 40 Mont. 599, 107 Pac. 904, and Osterholm v. Boston & Montana C. C. & S. M. Co., 40 Mont. 508, 107 Pac. 499; and on the general

proposition that the respondent is bound by the law of the place where the injury occurred, counsel cite: Baltimore & Ohio S. W. R. Co. v. Reed, 158 Ind. 25, 92 Am. St. 293, 62 N. E. 488, 56 L. R. A. 468, Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410; Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 38 Am. St. 163, 11 So. 803, 18 L. R. A. 433; Kansas City Ft. S. & M. R. Co. v. Becker, 67 Ark. 1, 77 Am. St. 78, 53 S. W. 406, 46 L. R. A. 814; Turner v. St. Clair Tunnel Co., 111 Mich. 578, 66 Am. St. 397, 70 N. W. 146, 36 L. R. A. 134; Mexican Nat. R. Co. v. Jackson, 89 Tex. 107, 59 Am. St. 28, 33 S. W. 857, 31 L. R. A. 276. The trouble with the application of the rules announced by these authorities is that in the present case the appellant failed to plead and prove in the lower court the laws of Montana as a defense to the action. We cannot take judicial notice of the laws of a sister state. In the absence of pleading and proof as to what the laws are in a sister state, we must assume that the same law prevails in the foreign state that prevails here. The authorities are uniform to this effect.

Where the question before the court is governed by the rule of the common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred and that it is the same in that state as in the state of the forum. (5 Ency. of Ev. 817-820; Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751; Taber v. Seaboard Air Line Ry. Co., 81 S. C. 317; 62 S. E. 311.

After a somewhat laborious and tedious examination of this case a second time, we feel that the original opinion correctly states the principles of law applicable to the case, and that the conclusion reached on the former hearing should stand as the judgment of the court in this case. The judgment of the trial court will therefore be affirmed to the extent of $10,000, on condition that the respondent file within thirty days after the going down of the remittitur a waiver of the excess of $5,000 and an acceptance of the judgment as thus modified. On failure to do so, the judgment will be reversed *in toto* and a new trial granted. Modified and affirmed acordingly, with costs in favor of the respondent.

SULLIVAN, C. J., concurs.

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[1] Hughes on Evidence, p. 4.

HANKINSON v. TRENTON.

51 N. J. 495. (1889)

The opinion of the court was delivered by

GARRISON, J. This certiorari brings up the record of the summary proceedings had before one of the police justices of the city of Trenton, which resulted in the conviction of the prosecutor of the violation of an ordinance of the board of excise commissioners of the said city. Of the various reasons presented by the prosecutor for the reversal of the judgment against him, it will be necessary to consider but one, viz., that the ordinance of the excise board, for the alleged violation of which he was convicted, was not offered or introduced in evidence on the trial before the magistrate.

The complaint filed with the justice alleges that a certain sale of spirituous liquors by the prosecutor was "contrary to and violative of the ordinance entitled 'An ordinance concerning inns and taverns, saloons and bowling alleys, and the sale of intoxicating liquors in the city of Trenton,' passed by the board of excise commissioners of the said city of Trenton, on the eleventh day of May, eighteen hundred and eighty-seven."

The existence of this ordinance is obviously the foundation of the entire proceeding against the prosecutor. The record of a conviction, resting solely upon this enactment as its foundation, would be fatally defective if it failed to show that the justice had, as part of the case before him, legal evidence of the existence of the ordinance which was the gravamen of the complaint. When a special power is given to a magistrate by statute to convict an offender in a summary manner, without a trial by jury, the record must show everything necessary to constitute a legal conviction. Keeler v. Milledge, 4 Zab. 142; Doughty v. Conover, 13 Vroom 193.

The transcript of the proceedings before the police justice in the present case shows that, after both sides had rested, a motion was made on behalf of the prosecutor, that the case be dismissed, upon the ground that it had not been shown that any ordinance had been violated —"no ordinance having been introduced in evidence"—which motion the justice denied.

It was suggested upon the argument that the ordinance in question was one of which judicial notice might be taken. By this view it is assumed, as a rule of evidence, that the acts of a municipality will be noticed judicially by all the courts thereof. This position, which finds

some support from the text writers, need not now be examined, inasmuch as the ordinance in question is not an enactment of the municipality of which the police justice is a judicial officer, but is a by-law or ordinance of one of the city departments, to wit, the board of excise commissioners.

This board is erected under the provisions of "An act to establish an excise department in cities in this state," approved April 8th, 1884 (Pamph. L., p. 133), whereby the city council of any city is authorized to provide for the establishment of a board of excise commissioners, who shall, when organized, have the sole power to make by-laws or ordinances regulating the liquor traffic in said city, and prescribing and enforcing the penalty for the violation thereof.

The ordinances thus to be enacted are not submitted to city council for approval, but remain the sole and separate acts of the board of excise commissioners.

The extension of the doctrine of judicial notice to by-laws and enactments such as these would be to lay down the rule, that, before any municipal court, no proof need be offered of the acts or proceedings of any other department or subordinate body owing its existence to the same municipality. Such a doctrine need but be stated to be its own best refutation. It is, perhaps, needless to say, that not a vestige of authority for such a position can be found.

The record of this conviction therefore failing to show the ordinance of the board of excise commissioners upon which it rests, is fatally defective, and the judgment of the police justice must, for this reason, be reversed.

FREMONT v. THE UNITED STATES.

58 U. S. 542. (1854)

This was an appeal from the District Court of the United States for the Northern District of California.

Fremont, the appellant, claimed title to a large tract of land, and prosecuted his claim before the board of commissioners, who decided in his favor. That decision having been reversed by the District Court, the case is now brought here by appeal.

The title of Fremont was derived from Juan Alvarado, to whom a grant was issued, in 1844, by Manuel Micheltorrena, then governor

and commandant-general of the department of the Californias, purporting to be founded upon the patriotic service of Alvarado.

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

The court have considered this case with much attention. It is not only important to the claimant and the public, but it is understood that many claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case.

It is proper to remark, that the laws, of these territories under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a State of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the reconstruction of a statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts, and the practice of the different tribunals and public authorities. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources. It exercises its discretion when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion as to the unwritten law of the state, or the construction given to one of its statutes.

With these principles, which have been adjudicated by this court, to guide us, we proceed to examine the validity of the grant to Alvarado, which is now in controversy.

Upon the whole, it is the opinion of the court that the claim of the petitioner is valid, and ought to be confirmed. The decree of the district court must, therefore, be reversed, and the case remanded, with directions to the district court to enter a decree conformably to this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of California, and was argued by counsel. On consideration whereof, it is the opinion of this court that the claim of the petitioner to the land,

as described and set forth in the record, is a good and valid claim; whereupon it is now here ordered, adjudged, and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for further proceedings to be had therein, in conformity to the opinion of this court.

EASTERN BUILDING AND LOAN ASSOCIATION v. WILLIAMSON.

189 U. S. 122. (1903)

MR. JUSTICE BREWER delivered the opinion of the court.

The law of New York was so proved in this case, and the contention is that it was not rightly construed by the South Carolina courts; that the law of New York which entered into and formed a part of the contract sued on was not given by those courts the same force and effect that it had in New York, and that hence the rights secured by the Constitution of the United States to the plaintiff in error were denied. If it appeared that the South Carolina courts, without questioning the validity, simply construed a statute of New York, no Federal question would be presented.

But it is contended that the construction of the New York statutes as applicable to this contract was shown by the decisions of the courts of that state and the opinion of one learned in its laws; that there was no contradictory testimony, and, therefore, it was the duty of the South Carolina courts to find as a fact that such was the true construction.

After the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other states are facts to be proved, yet when proved their construction and meaning are for the consideration and judgment of the courts in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel, for, as he states, his opinion is based on the statutes, the articles of incorporation and the decisions of other states under like statutes, articles of incorporation and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. Laing v. Rigney,

160 U. S. 531. The duty of the court to construe and decide remains the same.

Neither was the promise *ultra vires* the corporation. We are saved from the necessity of an extended discussion of these questions by a recent opinion of the Court of Appeals of New York in the case of Vought v. this defendant, Eastern Building & Loan Association, decided December 2, 1902, 172 N. Y. 508. It is true that the decision was not offered in evidence on the trial of this case in the South Carolina court. It had not then been announced. And it is also true that we do not take judicial notice of the decisions of the courts of one state in a case coming to us from the courts of another. Hanley v. Donoghue, 116 U. S. 1, 6; Chicago & Alton Railroad v. Wiggins Ferry Co., 119 U. S. 615-622; Loyd v. Matthews, 155 U. S. 222, 227. But nevertheless we may properly refer to the opinion as a construction of the law, and the views therein expressed not only commend themselves to our judgment as intrinsically sound, but also, as the views of the law of New York entertained by the justices of its highest court, have a peculiar and persuasive appropriateness.

We deem it unnecessary to add any observations of our own to these satisfactory declarations of the law of New York.

We see no error in the record, and the judgment of the Supreme Court of South Carolina is

Affirmed.

LAMAR v. MICOU.

114 U. S. 218. (1884)

MR. JUSTICE GRAY delivered the opinion of the court.

This is a petition for a rehearing of an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, upon a bill filed against the executor of a guardian by the administratrix of his ward.

The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. Owings v. Hull, 9 Pet. 607; Pennington v. Gibson, 16 How. 65; Covington Drawbridge Co. v. Shepherd, 20 How. 227. And nothing has now been adduced tending to show that, as applied to the facts admitted by

the parties, either the law of Georgia or the law of New York was other than we have held it to be.

The question whether, as matter of fact, Lamar acted with due care and prudence in making his investments, was argued at the former hearing, and no reason is shown for reopening that question.

Rehearing denied.

UNITED STATES v. PEROT.

98 U. S. 428. (1878)

Appeal from the District Court of the United States for the District of Louisiana.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The claim in this case is for four leagues of land granted by Bernardo Fernandez, commandant of the post of Nacogdoches, under the Spanish government, in the Province of Texas, to Pedro Dolet, on the 27th of December, 1795, and extended in possession on the 14th of January, 1796.

The claimants obtained a decree below for four American or English leagues; and such leagues may have been inadvertently allowed in some previous cases. But it is evident that no such leagues were in the minds of the parties. The leagues intended were Spanish leagues, such as were used in land measures and grants in Mexico and Texas at that period. Now we are bound to take judicial notice that the Mexican league was not the same as the American league. The laws of Mexico, of force in Texas previous to the Texan revolution, were the laws not of a foreign, but of an antecedent government, to which the government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them. Fremont v. United States, 17 How. 542, 557.

It is important that the uniform practice and usage of a country should be observed in the construction of all grants made therein whilst such usage prevailed.

For this reason, we think that in Texas, and in relation to grants emanating from the Mexican government in that province, before its

separation from the parent State, the vara and league recognized in land measures there should be respected.

Allowing the claimant, therefore, at the rate of 4,428.4 acres to the league, according to the rate above referred to, he is entitled to a decree for 17,713.6 acres, instead of 23,040, as decreed by the court below, requiring a deduction of 5,326.4 acres. If the claimant will remit this excess, he will be entitled to an affirmance for the balance, namely, for 17,713.6.

On filing such remitter, a decree may be entered accordingly; and it is

So ordered.

CUBA RAILROAD COMPANY v. CROSBY.

222 U. S. 473. (1911)

The facts are stated in the opinion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for the loss of a hand through a defect in machinery, in connection with which the defendant in error, the plaintiff, was employed. The plaintiff had noticed the defect and reported it, and, according to his testimony, had been promised that it should be repaired or replaced as soon as they had time, and he had been told to go on in the meanwhile. The jury was instructed that if that was what took place the defendant company assumed the risk for a reasonable time, and, in effect, that if that time had not expired the plaintiff was entitled to recover. The jury found for the plaintiff. The accident took place in Cuba, and no evidence was given as to the Cuban law, but the judge held that if that law was different from the *lex fori* it was for the defendant to allege and prove it, and that as it had pleaded only the general issue the verdict must stand. 158 Fed. Rep. 144. The judgment was affirmed by a majority of the Circuit Court of Appeals. 170 Fed. Rep. 365. 95 C. C. A. 539.

The court below went on the ground that in the absence of evidence to the contrary it would "apply the law as it conceives it to be, according to its idea of right and justice; or, in other words, according to the law of the forum." We regard this statement as too broad, and as having been wrongly applied to this case.

It may be that in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or

services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. Parrot v. Mexican Central Railroad Co., 207 Massachusetts, 184. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. Slater v. Mexican National R. R. Co., 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. See Bean v. Morris, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights.

The language of Mr. Justice Bradely in The Scotland, 105 U. S. 24, with regard to the application of the *lex fori* to a case of collision between vessels belonging to different nations and so subject to no common law, referred to that class of cases and no others, and was used only in coming to the conclusion that foreign vessels might take advantage of our Limited Liability Act. See also The Chattahoochee, 173 U. S. 540, 550. Other exceptional cases are referred to in American Banana Co. v. United Fruit Co., *ubi supra*, such as those arising in regions having no law that civilized countries would recognize as adequate. But as to causes of action arising in a civilized country the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn. The principle adopted by the decisions of this court is clear. See also Dicey, Confl. of Laws, 2d ed., 647 *et seq.*

We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.

In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought There is

no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 Fed. Rep. 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still. Savage v. O'Neil, 44 N. Y. 298. Crashley v. Press Publishing Co., 179 N. Y. 27, 32, 33. Aslanian v. Dostumian, 174 Mass. 328, 331.

Even if we should presume that an employe could recover in Cuba if injured by machinery left defective through the negligence of his employer's servants, which would be going far, that would not be enough. The plaintiff recovered, or, under the instructions stated at the beginning of this decision, at least may have recovered, notwithstanding his knowledge and appreciation of the danger, on the strength of a doctrine the peculiarity and difficulties of which are elaborately displayed in the treatise of Mr. Labatt. 1 Labatt, Master & Servant, ch. 22, esp. Sec. 424. To say that a promise to repair or replace throws the risk on the master until the time for performance has gone by, or that it does away with or leaves to the jury what otherwise would be negligence as matter of law is evidence of the great consideration with which workmen are treated here, but cannot be deemed a necessary incident of all civilized codes. It could not be assumed without proof that the defendant was subject to such a rule.

There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. The Maggie Hammond, 9 Wall. 435. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt.

Judgment reversed.

CASE v. MAYOR OF MOBILE.

30 Ala. 538. (1857)

The appellant was fined $50 by the mayor of the city of Mobile, for an alleged violation of an ordinance, prohibiting the selling of liquor without a license; and removed the proceedings, by appeal, into the city court, where the following complaint was filed against him:

"Mayor, Aldermen, and Common Council of Mobile vs. John Case. Plaintiff claims of defendant $50, for violation of the ordinance set forth.

"Plaintiff claims the sum of $50 as a fine, for that the defendant, on the 4th May, 1856, did sell to certain slaves, whose names and owners are unknown, one a yelloy boy, about thirty-four years of age, and one a black boy, about twenty-two years of age, in the city of Mobile, spirituous liquors, without the written permission of the owner, master, or agent, contrary to the ordinance of said corporation then in force, a copy of which is hereto attached."

The defendant demurred to this complaint, for uncertainty and insufficiency, 1st, in not giving the names of the slaves or their owners; 2d, in not setting out the ordinance alleged to have been violated; and 3d, in not alleging a breach of any ordinance. The overruling of this demurrer is now assigned as error.

Chamberlain & Robinson, for appellant.

Daniel Chandler, *contra.*

RICE, C. J. In declaring on a by-law, the liability of the defendant must distinctly appear. As the appellee in the present case is a municipal, or public corporation, the courts of this State will take judicial notice of its charter, and of its power to make by-laws; but not of the by-laws made by it. In a complaint for a penalty under one of its by-laws, the by-law must be set forth, and the breach of it, and the right of the plaintiff to sue for the penalty. Company of Feltmakers v. Davis, 1 Bos. & Pul. 98; 1 Saund. Pl. & Ev. 324; Comyn's Dig., title, Pleader, (2 W. 11).

Tested by the principles above stated, the complaint in this case is not sufficient; and the court below erred in overruling the demurrer to it. For that error, the judgment is reversed, and the cause remanded.

ATKINSON v. MOTT.

102 Ind. 431. (1885)

BLACK, C. The appellees, Prudence Mott and her husband, sued the appellant to recover damages for injuries to the property of said Prudence, done by trespassing cattle of the appellant.

The defendant's demurrer to each paragraph of the complaint for want of sufficient facts was overruled. There was an answer in denial. A jury returned a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and judgment was rendered on the verdict.

The statute of 1877, section 4835, R. S. 1881, provides: "If any domestic animal break into an inclosure or wander upon the lands of another, the person injured thereby shall recover the amount of damage done, provided, that in townships where, by order of the board of county commissioners, said domestic animals are permitted to run at large, it shall appear that the fence through which said animal broke was lawful; but where such animal is not permitted to graze upon the uninclosed commons, it shall not be necessary to allege or prove the existence of a lawful fence in order to recover for the damage done."

The making of the order of the board of county commissioners, to which reference is made in this statute, is a matter of which courts, in such cases, will not take notice, unless it be shown as other facts must be shown; and in the absence of any averment that such an order had been made, it must be assumed, for the purposes of the ruling upon the demurrer, that there was no such order, and that, as at common law, the owner of the trespassing cattle was responsible to the person injured.

We find no error in the record.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

WATT v. JONES.

60 Kans. 201. (1899)

The opinion of the court was delivered by SMITH, J.: The plaintiff was a candidate for the office of councilman of the fifth ward on the populist or citizens' ticket, he being a duly qualified elector of said ward and city, and the said defendant was a candidate for the same office, in opposition to the plaintiff. The prayer was for a judgment of ouster, asking that the defendant Watt be excluded from the said office, and that the plaintiff Jones be awarded the same, and for costs.

This was a civil action between individuals, and we think the rule is well established that, in such cases, an ordinance, which is a mere by-law of a municipal corporation, must be pleaded either by quoting its language or stating the substance of its provisions. A reference to the title is not sufficient. Ordinances stand on the same footing as private and special statutes, the laws of other states, and of foreign countries, and must be averred and proved like other facts. (17 A. & E. Encycl. of L. 262; City of Austin v. Walton, 68 Tex. 507, 5 S. W. 70.)

Upon this question this court has heretofore gone no further than to hold that in misdemeanor cases, where an appeal is taken from the police court of a city to the District Court, the latter will take judicial notice of the ordinance under which the defendant is being prosecuted. In such cases the District Court is *pro hac vice* the police court. (City of Solomon v. Hughes, 24 Kan. 740, 14 Pac. 281.)

The judgment of the court below will be affirmed.

GEORGE W. WICKERSHAM v. RICHARD JOHNSTON.

104 Cal. 407. (1894)

MCFARLAND, J. The plaintiff brought three actions against the defendant, each upon a promissory note made by the defendant to one John Lancaster, since deceased, who was a British subject and a resident of England, where he died testate on the 21st of April, 1884. The three actions were by the consent of parties and an order of the court consolidated. The court rendered judgment for plaintiff for the

amount of the principal and interest of said three notes, with costs, etc. Defendant appeals from the judgment.

The judgment of the lower court went upon the theory, founded upon the findings, that the two sons of the deceased, George Grantville Lancaster and John Lancaster (Jr.), were appointed by the will of the deceased as the executors thereof and qualified as such; and were also appointed "administrators of the personal estate" of the deceased John Lancaster; that the will of the deceased was duly probated in an English court; that by said will the said sons were also made residuary legatees; and that on November 15, 1880, the said sons, George and John, as such executors and administrators, and being the owners of said notes, "sold, transferred, and set over" the same to the plaintiff herein.

The main evidence in the case introduced by plaintiff is found in a certain commission to take the testimony of said George and John Lancaster, issued to John C. New, consul general of the United States at London, by which it was undertaken to prove all the foregoing facts as to the death of John Lancaster, deceased, the existence of the will, its probate, issuance of letters testamentary and letters of administration to the sons, etc. Many objections were made by appellant to various parts of the evidence contained in said commission; but we will assume for the present that the evidence contained in said commission sufficiently shows the facts above referred to. There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here; and it must, therefore, be assumed that the law with respect to those matters was the same there as in California. (Norris v. Harris, 15 Cal. 254; Hickman v Alpaugh, 21 Cal. 226; Hiss v. Crigby, 32 Cal. 55; Marsters v. Lash, 61 Cal. 624; Monroe v. Douglas, 5 N. Y. 447; Liverpool etc. Co. v. Phenix Ins. Co., 129 U. S. 445.) This rule applies to England as well as to sister states of the American nation. In Liverpool etc. Co. v. Phenix Ins. Co., 129 U. S. 445, the Supreme Court of the United States say: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and like any other foreign law is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved."

The judgment is reversed and the cause remanded for a new trial.

NEESE v. THE FARMER'S INSURANCE CO.

55 Iowa 602. (1881)

Action upon a policy of insurance. There was a verdict and judgment for plaintiff; defendant appeals. The facts of the case are stated in the option.

BECK, J. The plaintiff was permitted to read to the jury the depositions of plaintiff and his wife, giving material testimony in his behalf. The deposition was taken in Nebraska, before a notary public and his official seal did not disclose his name. Objection to the deposition, on the grounds that the seal of the notary did not show the name of the officer, was made by motion to suppress, and at the trial the objection was renewed. It is not shown that the seal of the notary is sufficient under the law of Nebraska. We will not take judicial notice of the statutes of Nebraska, and, in the absence of proof, will presume them to be the same as our own. Our statute requires the seal of the notary to show the name of the officer. The attestation of the notary was therefore, insufficient. Stephens v. Williams, 46 Iowa, 540. The depositions ought to have been excluded.

Reversed.

DENVER & RIO GRANDE RAILROAD COMPANY v. UNITED STATES.

9 N. M. 389. (1898)

MILLS, C. J. The above entitled causes were considered and heard as one in this court. They grow out of a suit in trover brought in the first judicial district of this territory by the United States against the Denver & Rio Grande Railroad Company, to recover five thousand dollars alleged damages for the conversion of certain timber and railroad ties taken by the defendant from the public lands. Judgment was given in favor of the United States for one hundred and seventy-four dollars. Both sides sued out writs of error alleging on the one side that no judgment for any amount should have been given and upon the other that it was too small. No evidence was taken in the trial before the lower court, as the case was submitted entirely upon a stipulation and the rulings thereon.

This stipulation evidently does not cover all the facts in the case, as it fails to show the contents of a special act of congress, approved June 8, 1872, and an act amendatory thereof approved March 3, 1877, and as the law required special acts to be proven on the trial of a cause the same as any other fact, as its contents do not appear in the record we can not take judicial knowledge thereof. Leland v. Wilkinson, 6 Peters 317; 1 Wharton on Ev., 8, 291, and cases cited in note.

Reversed.

GREEN v. THE CITY OF INDIANAPOLIS.

22 Ind. 192. (1864)

(Complaint under a city ordinance.)

PERKINS, J. Neither the by-law, (the ordinance on which the suit was based) nor any section of it, nor a copy of either, was filed with the complaint, or anywhere appears in the record. The complaint is fatally defective for this reason. 5 Blackf. 236, 8 Ind. 130, 16 Ind. 273.

In this state, where municipal corporations are organized under the general law, the court would take judicial notice of their powers to enact by-laws, but not of the fact that any given one had been enacted. As the by-law or ordinance in question, then, is not in the record, and the court does not take judicial notice of such corporate acts, we can not pass upon its legal construction or validity. Indeed, we do not know that any such exists.

A public statute need not be set out in pleading, nor, in this state, need a private act of the legislature, 2 G. & H. p. 109. But statutes of other states, relied upon must be set out by copy, and so must by-laws of corporations, for they are not statutes of the state.

If there was no appeal from the judgment of the mayor in these cases, it might well be that by-laws should not be set out, but should be judicially noticed by the mayor; but as appeals are allowed to the state courts, the acts of the corporations relied on as foundations of suits or defenses must be set out in the pleadings, and proved on trials to bring them before the Appellate Courts.

The record before us shows no cause of action. It is as important that a by-law sued on be set out, as it is that a written instrument should be.

PER CURIAM. The judgment below is reversed, with costs. Causes remanded, etc.

OWINGS & OWINGS v. JAMES F. HULL.

34 U. S. 607. (1835)

MR. JUSTICE STORY, after stating the facts, delivered the opinion of the court.

The original suit was brought to recover back the purchase-money paid by the defendant in error for the slaves, and other compensation for the defect of title. The jury found a verdict for the original plaintiff, for two thousand six hundred and thirty-six dollars and ninety-six cents, upon which judgment was rendered accordingly; and the present writ of error is brought to revise that judgment upon certain bills of exceptions taken at the trial, on behalf of the plaintiffs in error.

The next objection was, that the copy of the original bill of sale of the slaves to Hull, on record in the notary's office, was not evidence, unless the plaintiff accounts for the non-production of the original. The validity of this objection depends upon this consideration, whether the non-production of the original was sufficiently accounted for. It was not accounted for by any proofs offered on behalf of the plaintiff; and unless the Circuit Court could judicially take notice of the laws of Louisiana, there was nothing before the court to enable it to say, that the non-production of the original was accounted for.

We are of opinion, that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the Constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.

Under these circumstances, we are at liberty to examine the ob-

jection above stated, with reference to the known laws of Louisiana. Now, in Louisiana, as, indeed, in all countries using the civil law, notaries are officers of high importance and confidence; and the contracts and other acts of parties, executed before them and recorded by them, are of high credit and authenticity. Some contracts and conveyances are not valid, unless they are executed in a prescribed manner, before a notary; others again, if executed by the parties elsewhere, may be recorded by a notary, the protocol or original remains in his possession *apud acta;* and the act is deemed, what is technically called, an "authentic act;" and a copy of such act, certified as a true copy by the notary, who is the depositary of the original, or his successor, is deemed proof of what is contained in the original, for the plain reason that the original is properly in the custody of a public officer, and not deliverable to the parties. This will abundantly appear, by a reference to the Civil Code of Louisiana, from article 2231 to article 2250. Now, the bill of sale in the present case, is precisely in that predicament. It was executed before a notary in the manner prescribed by the laws of Louisiana; the original is in his possession, and is an authentic act, *apul acta;* and, therefore, the party is not entitled to the possession of it, but only to a copy of it. So that the absence of the original is sufficiently accounted for; and the copy being duly proved, was properly admissible in evidence. There was no error, therefore, in the Circuit Court, in admitting this evidence.

Reversed and remanded on other grounds.

LARUE v. INSURANCE CO.

68 Kan. 539. (1904)

The opinion of the court was delivered by SMITH, J.: Edward LaRue, son of the plaintiff in error, was insured in the sum of $1000 by the Kansas Mutual Life Insurance Company under a policy which contained the following condition:

"Military or Naval Service.—The insured under this policy is permitted to serve in the militia or in the military or naval force of the United States in time of peace without prejudice to his policy; and he may so serve in time of war by giving the company notice in writing, and paying an extra premium therefor, not to exceed three per cent per annum upon the amount insured. But should such notice not be

given and the extra premium for war hazard not be paid at the time the risk is incurred, the company will be liable for the reserve only on this policy, computed according to the actuaries' table of mortality and four per cent interest."

In September, 1899, the policy being in force, LaRue enlisted in the volunteer service of the United States and went with his regiment to the Philippine islands. No extra premium was paid on the policy. In May, 1900, he was killed at the village of Loculan in the island of Mindanao, by a blow from a weapon known as a bolo, in the hands of an insurrecto. Such facts appeared in the proofs of death given to the company. This was an action by the mother of the deceased, and beneficiary under the policy, to recover the full amount of the insurance. She was defeated in the trial court.

Plaintiff below offered to prove that Loculan, the place where the assured was killed, was in a region where there was no armed resistance against the forces of the United States; that the insured with his company, was sent there from the island of Luzon, after a period of active service, for the purpose of having an opportunity to rest; that the soldiers stood guard with empty guns; that prior to the death of the insured there was no disturbance of any kind on that island or at that place. The offer of this proof was rejected, on the ground that the court took judicial notice that the inhabitants of the island of Mindanao were at the time in a state of insurrection against the sovereignty of the United States government.

We judicially know that under the treaty of Paris between the United States and the kingdom of Spain, signed December 10, 1898, the Philippine islands became a part of the territory of the United States, and that after that time the inhabitants of those islands were in a state of insurrection against our government. The existence of war is a political question and not a judicial one. Courts take notice, without proof, of the acts of the different political departments of the government. (See Phillips v. Hatch, 1 Dill. (C. C.) 571, Fed. Cas. No. 11,094.)

In passing on a claim of Lieutenant Stickle for property lost en route from West Point to Manila, the war department, in December, 1901, through Secretary Root, announced:

"The insurrection in the Philippines against the sovereignty of the United States and the authority of the government of the Philippine islands is of such character and extent as requires the United States to prosecute its rights by military force, and therefore creates the condition of war in said archipelago."

This expression, however, was made at a date subsequent to the death of LaRue. On July 4, 1902, the president issued a proclamation of amnesty as follows:

"Whereas, The insurrection against the authority and sovereignty of the United States is now at an end, and peace has been established in all parts of the archipelago, except in the country inhabited by the Moro tribes, to which this proclamation does not apply; and

"Whereas, During the course of the insurrection against the kingdom of Spain and against the government of the United States persons engaged therein, or those in sympathy with or abetting them, committed many acts in violation of the laws of civilized warfare, but it is believed that such acts were generally committed in ignorance of those laws and under orders issued by the civil or insurrectionary leaders;

"Now, therefore, be it known, That I, Theodore Roosevelt, president of the United States of America, by virtue of the authority and power vested in me by the constitution, do hereby proclaim and declare, without reservation or condition, except as hereinafter provided, a full and complete pardon and amnesty to all persons in the Philippine archipelago who have participated in the insurrection aforesaid."

The Moro tribes mentioned in the preamble of the proclamation inhabit the island of Mindanao, where the insured was killed. The existence of an insurrection there was in this form expressly recognized by the government.

It being established that an insurrection existed in 1901 and 1902, the question still remains whether courts will take knowledge of such insurrection at a prior date, in the absence of a formal declaration of war. In Prize Cases, 2 Black, 635, 666, 17 L. Ed. 459, the Supreme Court of the United States has said:

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government."

The hostile opposition which continued in the Philippine islands after the treaty of Paris was in the nature of a civil war which, as stated in the above opinion, begins by insurrection, and the courts take judicial notice of it as a fact in history. In City of Topeka v. Gillett, 32 Kan. 431, 437, 4 Pac. 800, Mr. Justice Valentine, speaking for the court on the subject of judicial notice, said:

"Courts may take judicial notice of the census returns, of the general history of the country, of what the members of the legislature ought to know when passing the statute which the courts are called

upon to construe; and, indeed, of what all well-informed persons ought to know."

Every well-informed person knows the history of the late war with Spain and its results. The accession of foreign territory is a part of the world's history. The existence of an insurrection in the newly acquired islands which continued against the authority of the United States after that territory had been obtained from Spain is an event in our national career which every schoolboy knows. Courts would stultify themselves by requiring proof of such public matters, concerning which judges are informed in common with all other persons who read.

Knowing judicially that there was a state of war against the authority of this nation in the Philippine islands immediately after they were acquired from Spain, in 1898, we also know by recitals in the president's proclamation that the insurrection had not ended in 1902, so far as the island of Mindanao was concerned. While stationed on this island the command to which LaRue was attached was in a country whose inhabitants were in a state of hostility to the national authority which he was enlisted to defend. The warlike spirit of these inhabitants increased the peril of a soldier, active or at rest, within that territory in the service of a country to which such insurgents disclaimed allegiance.

The judgment of the court below will be affirmed. All the judges concurring.

HANLEY v. DONOGHUE.

116 U. S. 1. (1885)

This was an action brought by Michael Hanley and William F. Welch against Charles Donoghue in the Circuit Court of Baltimore County, in the State of Maryland, upon a judgment for $2000, recovered by the plaintiffs on June 4, 1877, in an action of covenant against the defendant, Charles Donoghue, together with one John Donoghue, in the Court of Common Pleas of Washington County in the State of Pennsylvania, and there recorded.

The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said Court of Common Pleas, and alleged that it was still in force and unreversed.

The second count contained similar allegations, and also alleged that in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that state valid and enforceable against Charles Donoghue and void as against John Donoghue," and that "by the law of Pennsylvania any appeal from the judgment so rendered to the Supreme Court of Pennsylvania (which is the only court having jurisdiction of appeals from the said Court of Common Pleas) is required to be made within two years of the rendition of the judgment, nevertheless no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them."

The defendant filed a general demurrer to each and all of the counts, which was sustained, and a general judgment rendered for him. Upon appeal by the plaintiffs to the Court of Appeals of the State of Maryland, the judgment was affirmed. 59 Maryland, 239. The plaintiffs thereupon sued out this writ of error, on the ground that the decision was against a right and privilege set up and claimed by them under the Constitution and laws of the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. Talbot v. Seeman, 1 Cranch, 1, 38; Church v. Hubbart, 2 Cranch, 187, 236; Strother v. Lucas, 6 Pet. 763, 768; Dainese v. Hale, 91 U. S. 13, 20. It is equally well settled that the several states of the Union are to be considered as in this respect foreign to each other, and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws of another state. In Buckner v. Finley, 2 Pet. 586, in which it was held that bills of exchange drawn in one of the states on persons living in another were foreign bills, it was said by Mr. Justice Washington, delivering the unanimous opinion of this court: "For all national purposes embraced by the Federal Constitution, the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." 2 Pet. 590.

Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Buckner v. Finley, 2 Pet. 592; M'Elmoyle v. Cohen, 13 Pet. 312, 324; D'Arcy v. Ketchum, 11 How. 165, 176; Christmas v. Russell, 5 Wall. 290, 305; Thompson v. Whitman, 18 Wall. 457.

Congress, in the execution of the power confered upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one state to entitle them to be proved in the courts of another state, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the state from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. Knowles v. Gaslight & Coke Co., 19 Wall. 58; Settlemier v. Sullivan, 97 U. S. 444. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the state in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority, (as is shown by the cases collected in the margin) whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions in Ohio v. Hinchman, 27 Penn. St. 479, and Paine v. Schenectady Ins. Co., 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort.

When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of

the National Government, doubtless takes notice, without proof, of the laws of each of the United States.

But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here.

In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. Course v. Stead, 4 Dall. 22, 27, note; Hinde v. Vattier, 5 Pet. 398; Owins v. Hull, 9 Pet. 607, 625; United States v. Turner, 11 How. 663, 668; Pennington v. Gibson, 16 How. 65; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 230; Cheever v. Wilson, 9 Wall. 108; Junction Railroad Co. v. Bank of Ashland, 12 Wall. 226, 230; Lamar v. Micou, 114 U. S. 218.

But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk, 7 Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." Talbot v. Seeman, 1 Cranch, 1, 38.

Where by the local law of a state, (as in Tennessee, Hobbs v. Memphis & Charleston Railroad, 9 Heiskell, 873), its highest court takes judicial notice of the laws of other states, this court also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the Court of Appeals has not only affirmed the general rule that foreign laws are facts, which, like other facts, must be proved before they can be received in evidence in courts of justice; but has held that the effect which a judgment rendered in another state has by the law of that state is a matter of fact, not to be judicially

noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that state is admitted by demurrer. Baptiste v. De Volunbrun, 5 Har. & Johns. 86, 98; Wernwag v. Pawling, 5 Gill & Johns. 500, 508; Bank of United States v. Merchants' Bank, 7 Gill, 415, 431; Coates v. Mackey, 56 Maryland, 416, 419.

From these considerations, it follows that the averment, in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that state against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who has been served with process in that state and void against John, who had not been so served, must be considered, both in the courts of Maryland, and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer.

Upon the record before us, therefore, the plaintiff appears to be entitled, under the Constitution and laws of the United States, to judgment on this count. It having been admitted at the bar that the other counts are for the same cause of action, it is unnecessary to consider them. The general judgment for the defendant is erroneous, and the rights of both parties will be secured by ordering, in the usual form, that the

Judgment of the Court of Appeals of Maryland be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

PRESUMPTIONS.[1]

EUREKA SPRINGS RY. v. TIMMONS.

51 Ark. 459. (1888)

HUGHES, J. While a passenger in one of the coaches on the railway of appellant en route from Seligman, Missouri, to Eureka Springs, Arkansas, appellee received personal injuries, by the coach in which he was seated leaving the track of the road, and turning over down an embankment.

The court overruled the motion for a new trial, defendant excepted and appealed to this court.

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[1] **Hughes on Evidence, p. 9.**

The appellants counsel insist that the injury, if any, was received in the State of Missouri on the Missouri and Arkansas Railway, which is a corporation existing in said state, and organized under its laws, and that no action will lie in Arkansas, unless it be shown, first, that the Eureka Springs Railway Company had purchased or leased the road owned by the Missouri corporation, or that said road had been legally consolidated with the Arkansas road as provided in secs. 5511, 5516, Mansfields Digest; and cites authorities to show that a corporation can exist only in the state of its creation. The complaint alleges, however, and the answer does not deny that the Eureka Springs Railway Company was operating its trains over the other road at the time the accident occurred and, therefore, if the evidence warrants, the company is liable at common law, being at the time a common carrier. In the absence of proof to the contrary the courts of this state will presume the common law to be in force in Missouri. Thorn v. Weatherly, 50 Ark., 237, and cases cited.

Finding no substantial error the judgment is affirmed.

McLAUGHLIN v. SOUVEREIGN CAMP, W. O. W.

97 Neb. 71. (1914)

SEDGWICK, J. This is an action on a fraternal beneficiary certificate for $1,000 issued by defendant to James W. McLaughlin. Plaintiff is the mother of assured, and is named in the certificate or insurance contract as beneficiary. In the petition it is alleged that assured is dead, and that he and plaintiff performed all of the conditions of the contract on their part. These allegations and the liability of defendant are denied in its answer. From judgment in favor of plaintiff for the full amount of her claim, defendant has appealed.

There is no direct evidence that the assured is dead. To establish the fact and the resulting liability of defendant, plaintiff relied on proof of assured's absence without tidings for more than seven years. The beneficiary certificate became effective as an insurance contract May 2, 1900. At that time assured was an unmarried man, about 24 years of age, resided with his father and mother and other members of their family at O'Neill, Nebraska. Shortly afterwards he went to Park City, Utah, and worked in a mine. While there he wrote and posted family letters regularly, and sent money to his mother. Early in

1904 he left Utah and went to Lima, Peru. His father and mother received from him a letter dated at that place March 30, 1904, in which he said he had changed his residence because he thought he could do better down there, and stating: "I am going up to a place called Cerro de Pasco, so I cannot give you any address with letter, but will write you when I get settled." A companion, who went with him to Lima, but who promptly returned to Park City, wrote to assured's father as follows: "We stayed in the city of Lima, Peru, a couple of weeks and I not seeing any favorable chances for work and not liking the climate, started for home. Jim refused to come with me, saying that he would try the mines first. On the day that I left there I saw him at the train starting for the mines of the Cerro de Pasco Mining Company which are located about sixty miles from the city." Assured has never since been heard of.

The best authorities, with substantial unanimity, hold that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case. Upon this point the Supreme Court of Kansas, which has perhaps required as strict proof to raise this presumption as has any court in this country, said: "It is conceived, however, that the character of the inquiry, the persons of whom it must be made, and the place or places where it must be made are all to be determined by the circumstances of the case." Modern Woodmen of America v. Gerdom, 72 Kan. 391. In that case and in Renard v. Bennett, 76 Kans. 848, the court appears to adopt the rule that, when a young unmarried man leaves the home of his parents and goes from place to place for some time, corresponding, and nothing is heard from him for more than seven years, inquiry must be made at all places and of all people where there was any probability that information might be obtained. But, in general, the courts of this country have held, as did the supreme court of Wisconsin, that it "does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years." Miller v. Souvereign Camp, W. O. W., 140 Wis. 505. The Supreme Court of Minnesota approved this instruction: "If you find from the evidence that on the 17th day of July, 1901, Behlmer (that is, Fred) left his home, wife, and children, and that he has never returned, and that no tidings from him have ever been received by his family, a presumption arises after seven years that he is dead." Behl-

mer v. Modern Woodmen of America, 146 Ia. 1; Oziah v. Howard, 149 Ia. 199.

In Thomas v. Thomas, 16 Neb. 553, it was held that a wife could not rely upon the presumption of the death of her husband because of his absence from her for a period of seven years, when she, after he had left her, removed from state to state, establishing new places of residence, and had made no inquiry at her place of residence at the time her husband left her. And, when the same case was before this court upon a subsequent appeal (19 Neb. 81), the court held that the fact that the husband had been seen alive within the seven years overcame the presumption of his death. But upon the first appeal it was definitely decided that, if he had been absent for a period of seven years, and during that time had not been heard from "by those who, were he living, would naturally hear from him," this was sufficient to raise the presumption of death. Surely it cannot be said that, under the evidence in this case, the finding of the trial court is so unsupported that we must say, as matter of law, that it is clearly wrong.

The findings and judgment of the trial court are not so unsupported by the evidence that we can say they are clearly wrong. The judgment is therefore

Affirmed.

COE v. NATIONAL COUNCIL OF K. & L. of S.

96 Neb. 130. (1914)

LETTON, J. This is an action to recover upon an insurance certificate. Plaintiff recovered, and defendant appeals.

Harry F. Ganson, on September 8, 1910, was a dentist, residing in Nebraska City, about 44 years of age. He had been married twice. The family consisted of his second wife with their three children, the oldest being 8 and the youngest 4 years of age. The ward of plaintiff, who is a daughter by the first wife, also lived in the family. Dr. Ganson had lived in Nebraska City for about 8 or 9 years. At the time of coming there he had but little of this world's goods, but was successful in his business, and by September, 1910, he had fully paid for his office building and fixtures, had purchased and furnished a home, a mortgage upon which was held by a building and loan association and was partly paid. He also had purchased and paid for three

or four city lots. His income was from $1,800 to $2,000 a year from his business. He carried $5,000 fraternal life insurance, $3,000 of which was in favor of his daughter Josephine. Eight days before his disappearance he allowed a $2,500 accident insurance policy to lapse. Some bills he was sending out were found on his desk, and some dental supplies he had ordered on the 17th came in on the 19th. He was a man of domestic tastes and spent most of his spare time with his family. His wife testifies that because his business kept him closely engaged he purchased a bicycle and it was his custom to take a ride each morning, leaving before the family were up and returning for breakfast. He was fond of fishing and swimming, and was a kind and indulgent husband and father. The family spent part of the summer of 1910 in Ohio, the doctor joining them, staying about two weeks, and coming home with them about the beginning of August. He was a member of the official board of the Methodist church, a member of the choir, and had no bad habits of any kind. He was fond of the open air, and while the family were in Ohio he pitched a tent in Riverside Park, near the Missouri River, and slept there during their absence, and on their return moved the tent to his back yard and slept there with his little boy. On Saturday, September 17, the family with some friends went to Riverside Park for a moonlight picnic. They returned home a little after 9 o'clock. The family soon retired, leaving Dr. Ganson sitting reading. About half past 2 in the morning Mrs. Ganson was awakened by the little boy crying, and found the doctor was not in the tent with him. She testifies he had drunk two cupfuls of coffee at the picnic, and he could not sleep when he drank coffee. His nightgown was hanging on the side of the bed where he had hung it. All of his clothing, except a pair of khaki trousers, a shirt and a pair of bicycle shoes, were in the places where they were usually kept. About 6 in the morning the doctor's bicycle was found at Riverside Park on the crest of the bluff overlooking the river. A stick was stuck in the mud on the bank of the river and the clothing taken by him was hanging upon this stick. His bicycle shoes and his socks were on the ground beside it. Tracks of a barefooted man led from this point to the water's edge, and there were other tracks coming from the water and leading to a drift or log that was lying partly in the water, and which had been used by boys to jump into the river. The bank of the river was muddy, but there were no footprints leading back to the solid ground. The sheriff, who reached the scene about 7 oclock in the morning, with others went up and down the river bank for a distance of between a half mile and a mile to see if they could find

any fresh tracks leading out of the river, but were unable to find any. In the afternoon the river, which was from 6 to 9 feet deep at that point, was dragged, and afterwards on Sunday and Monday dynamite was used in the attempt to raise the body. Search was also made for footprints for about a mile on the other side of the stream, but none were found, though the character of the bank was such that an imprint would have been left if a man had walked over it. The following Tuesday some men who were working at a brick-yard at a point about a mile below testify they saw an object which they believed to be a naked body coming down the river. When asked as to the color of the object, a witness answered: "Why, he was white and shiny—you could see hair, you know; it looked like a man's or woman's body." This object was out about 150 yards. Some of the men went after a boat, but before they got it launched and reached the spot the object had disappeared. Another witness watched the body while the men went for the boat. He says it was rolling along on the edge of a sand-bar, and sank before the boat reached the spot.

Notices were printed and distributed along the river and elsewhere. Mrs. Ganson wrote to many of his relatives and old school friends, and caused many inquiries to be made, but neither she nor any one else ever received any communication from him or from any other persons who saw him afterwards.

No evidence was introduced by the defendant. This action was begun about a year after the disappearance. The principle governing this case is well expressed, as follows, by Judge Sanborn in a case from this state, citing Cox v. Ellsworth, 18 Neb. 664, and other cases: "The established presumption of fact from the disappearance of an individual under ordinary circumstances, from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance. If this presumption was unaffected by countervailing facts, it would continue in the case at bar until August 22, 1899; but this presumption of fact is not conclusive. It may be overcome, not only when the testimony of those who saw the insured die or saw his body after his death is produced, or when he was last seen in a peril that might probably cause his death, but also, when all the facts and circumstances of the case—the possible motives, if any, of the lost one to absent and conceal himself in view of approaching failure, disgrace, or punishment, his possible motives, if any for returning to his family and occupation, his attachments to the members of his family and his friends, his interest and prospects in his business or occupation, and the extent of the unavailing search that has been

made for him—are such that they would take the case out of the category of an ordinary disappearance, and would lead the unprejudiced minds of reasonable men, exercising their best judgment, guided by the established rule that life is presumed to continue seven years after an unexplained disappearance, to the conviction that death had intervened at an earlier date." Northwestern Mutual Life Ins. Co. v. Stevens, 71 Fed. 258. See, also, Winter v. Supreme Lodge, K. of P., 96 Mo. App. 1, 101 Mo. App. 550.

While there is a possibility that Dr. Ganson may still be alive, we are of the opinion that a consideration of his whole history, his tastes, his habits, his occupation and his manner of life, when taken in connection with the facts that all the clothing which he is known to have been possessed of has been accounted for, that it was not shown that he was in possession of any money at the time of his disappearance, that his last known appearance in life was when he stood unclad upon the bank of the treacherous Missouri river, that what was believed by several witnesses to be the naked body of a human being a few days afterwards was seen in the river at a point below, was sufficient to justify the District Court in finding that he died as alleged in the petition. We have been cited in defendant's brief to numerous instances of the disappearance of persons who were afterward found to be alive, but in none that have been called to our attention are the circumstances similar to those in this case.

The judgment of the District Court was warranted by the evidence, and it is therefore

Affirmed.

MARQUET v. INSURANCE CO.

128 Tenn. 213. (1913)

MR. JUSTICE BUCHANAN delivered the opinion of the court.

This suit is based upon an insurance contract. The breach relied on is the failure to pay $2,000, the amount of the policy, upon proofs of death of the insured.

The defenses are two: First, that the payee or beneficiary in the policy sued on, at the date of its insurance, had no insurable interest in the life of the insured, and the contract sued on is therefore a wagering one and unenforceable; second, that the proofs do not show the

death of the insured, and therefore no breach is shown justifying a recovery.

There was a decree below for $2,132.50 and costs, from which the insurance company appealed, and has here assigned errors based on the defense above.

At the time of the issuance of the policy sued on, complainant was the lawful wife of Gus Marquet, and his was the life insured. The policy was issued April 7, 1893, and soon thereafter it was delivered to complainant, who paid all premiums which became due upon it after its issuance. Three years and over after its issuance on, to wit, April 21, 1898, at the suit of complainant she was granted absolute divorce from Gus Marquet by the Chancery Court of Hamilton County upon the ground of habitual drunkenness by Gus Marquet after his marriage to her, failure by him to provide for her and her children by him, etc. There followed an entire estrangement between Gus Marquet and complainant and her children. The latter were two sons, respectively, about twenty-one and twenty years of age, and a daughter about eighteen years old at the time of the divorce. The children were in sympathy with the mother in that suit.

Prior to the divorce, for many years, the home of the family and of Gus Marquet had been in Chattanooga, Tenn., but soon after the divorce, or during the years 1898 or 1899, he left Chattanooga, and took up his residence at Oakdale, Tenn., where he remained until about the year 1900, when he left Oakdale for a trip to New Orleans, and has not, as complainant insists, been heard from directly since that time, except through a letter supposed to have been from him, addressed to one of his nephews residing in Chattanooga in the year 1904. By one rumor he is said to have been seen in Detroit, Mich., by another in Memphis, Tenn., but the persons said to have seen him are not examined as witnesses; nor do the dates appear when they claim to have seen him.

The policy in suit, by its terms, was to live for a period of ten years from its date, in consideration of a fixed semi-annual premium to be paid the company. But it provided that at its expiration it might be renewed by the issuance of a new policy.

The second assignment of error, based on the second defense above, is that the court was in error in decreeing complainant a recovery of the amount of the policy sued on, because the evidence in this case does not justify the presumption in law that Gus Marquet was dead when this suit began.

Positive proof is always required where, from the nature of the

case, it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumption must take place, for where the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily or usually attend such facts, and these are called presumptions, which are only to be relied on until the contrary be actually proved. *Stabitur praesumptio donec probetur in contraium.* Violent presumption is many times equal to full proof, for there those circumstances appear which necessarily attend the fact." Blackstone, vol. 2, book 3, sec. 341.

Presumption is no magic or short-cut way by which proof of the essential and determinative fact may be dispensed with, for we see from the above quotation that "positive proof is always required, where, from the nature of the case, it appears that it might possibly have been had." And, evidently, by the next sentence in the quotation, it is meant to be said that a presumption is only a name for a conclusion reached by means of the weight of proven circumstances; and, which attend must be in evidence. Proof of the essential fact must be had, either direct or positive by witnesses who know the fact, or circumstantial by witnesses who know and testify to facts which tend to establish or prove the essential fact; and only when the circumstances are, in the judgment of the court or jury, such as usually or necessarily attend the essential fact are they sufficient in law to warrant a verdict, judgment, or decree establishing as a fact that which has not been proved by direct or positive evidence. This principle was applied by us in Dunlap v. State, 126 Tenn. 415, 150 S. W. 86.

The essential fact in the present case is the death of Gus Marquet. Upon satisfactory proof of his death, the contract sued on binds the insurance company to pay. There is no direct or positive proof of his death, no witness who testifies that he saw him die, or that he saw his body after death. It is then clearly a case where proof of the essential fact must be made by circumstantial evidence.

The main insistence for the complainant is that, under the proof offered by her in this record, a presumption that Gus Marquet is dead arises.

"The inference of death to be derived from unexplained absence is, at most, only a presumption, and it cannot arise unless the absence remains unexplained after diligent inquiry is made of the persons and at the places where tidings of the absentee, if living, would most probably be had." Renard v. Bennett, 76 Kan. 854, 93 Pac. 263, 14 Ann. Cas. 240, and authorities cited.

"According to the weight of modern authority, diligent inquiry among friends and relatives, and any others who would probably hear of an absentee, is necessary to raise a presumption of the latter's death, after an unexplained absence of seven years from home or place of residence." Modern Woodmen of America v. Gerdom, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095.

"Mere absence is not sufficient to raise the presumption. * * * Evidence of absence from his original place of residence will not raise the presumption of death, where it appears that he has moved to another place." Hansen v. Owens, 132 Ga. 652, 64 S. E. 800; Wentworth v. Wentworth, 71 Me. 74.

The complainant calls as witneses none of the collateral relatives of Gus Marquet who resided in Chattanooga. Her sole evidence to establish the presumption of death in this case is made by herself and her son, W. L. Marquet, who, as shown by the divorce bill, had refused to reside under the same roof with his father before the bill was filed.

Without going into the evidence touching inquiries made by the complainant in further detail, it suffices to say that, in our opinion, the evidence here does not warrant a finding that Gus Marquet was dead when this bill was filed. Complainant testified that he was up to the time she last saw him, always in good health, and that she had never known him to be sick as much as one day.

Wherefore the decree appealed from must be reversed. We think that we can see from this record that justice will in all probability be done by remanding this cause, with leave to each side to take further proof, and it is so ordered. Bank v. White, 114 Tenn. 73, 84 S. W. 697.

NEWELL v. NICHOLS.

75 N. Y. 78. (1878)

CHURCH, Ch. J. The able and elaborate opinion delivered by Judge Van Vorst, who tried the case at Special Term, renders it unnecessary to elaborate the question involved. I have examined with care all the points presented, and I concur fully with the opinion upon all of them, and with the views expressed therein.

The principal points decided are: 1st. That the appellants who

claim through a survivorship must prove the survivorship. 2d. That there is no presumption in law of survivorship in the case of persons who perish by a common disaster, as in this case, by shipwreck, without other evidence tending to prove the fact, and hence that the party upon whom the *onus* lies fails to establish it.

I should be content to adopt the opinion without further remark but for considerations which have suggested themselves to some of my brethren in respect to the question of survivorship, as applicable to the position of the appellants, which will be briefly noticed. The suggestion, as I understand it, is, that conceding the burden of proving survivorship to be upon the appellants, and that in this case there is no presumption that either particular child survived, yet as the law will not presume that they died at the same time, a presumption may be indulged that there was a survivor, and that it makes no difference which child survived as he would inherit the share of the other, and create a new line of descent for that share which would embrace the appellants. This of course would affect but one of the children's share, or one-quarter of the estate. The suggestion although apparently plausible in statement, cannot be sustained.

In the first place assuming such a presumption, it may be observed that the appellants are required to prove their right or title. Can a party successfully claim that as he is entitled to one thing or another, and as they are alike he will take either? It is an accidental circumstance that the shares of these children were alike in amount or kind. Suppose they had been unequal in amount, or that one had been in land, and the other in money, could the appellants have claimed either? Clearly not. As to the daughter's share there was a failure to prove a title because it does not appear that the son survived the daughter, and the same is true of the share of the son. The appellants hold the affirmative, and must establish their title to some specific share or interest, which they fail to do by an alternative claim. As they cannot claim either have they not failed as to both? A somewhat similar point, though upon a different ground was presented in Wing v. Angram (8 H. L. 183). The estate was limited to one Wing upon certain conditions in the respective wills of husband and wife, who were lost at sea. The husband gave everything to the wife, and adds: "And in case my wife shall die in my lifetime * * * then I give all my estate to William Wing." And the wife gave everything to the husband, and stated, "and in case my husband should die in my lifetime, then I devise, bequeath, and appoint the said property to the use of William Wing." Wing claimed under both wills, but the court denied

his claim under either, because he could not prove that either husband or wife survived. It is true in that case that the wills created a condition precedent, but as the condition was the same in each will the ultimate legatee claimed under both on the ground that it was immaterial which survived. Lord Chelmsford, in answering this point said: "If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favor, independently of the other, and no difference can be made in the rules of evidence, because the appellant accidentally happened to be the ultimate legatee in each will." The claim was not predicated upon the presumption of a survivor as here, but upon a unity of rights and interests, as legatee under both wills.

I do not think an alternative claim can be sustained, conceding the presumption of survivorship. However this may be a decisive answer to the suggestion is, that there is no legal presumption which courts are authorized to act upon that there was a survivor any more than there is any legal particular survivor. It is not claimed that there is any legal presumption that the children died at the same time. Indeed it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and as a physical fact it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect the common law differs from the civil law. Under the latter, certain rules prevail in respect to age, sex, and physical condition, by which survivorship may be determined, but nothing can be more uncertain, or unsatisfactory than this conjectural mode of arriving at a fact, which from its nature must remain uncertain, and often upon existence of which the title to large amounts of property depend. In the language of the Lord Chancellor, in Wing v. Underwood, (4 DeGex, M. & G. 633), "We may guess, or imagine, or fancy, but the law of England requires evidence." There are cases where a strong probability in theory at least would arise, that one person survived another, and perhaps as strong as that that there was a survivor, and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster, is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears

they will not undertake to solve it on account of the nature of the question, and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not a question of probability very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. The authorities are uniform upon this doctrine, but the expressions of some of the judges in announcing it are liable to be misunderstood as indicating a presumption of simultaneous death which is not the rule. For instance, Sir William Wynne said: "I always thought it the most natural presumption that all died together, and that none could transmit rights of property to another." (Rex. v. Hease, 2 Salk. 593; 2 Phill. 296, note c.; 5 B. & Ad. 91, 92.)

Sir John Nicoll said: "I assume that both perished in the same moment." (Taylor v. Diplock, 2 Phill. 261.) In the Matter of Selwyn (3 Hagg. Ec. R. 748), the court said: "But in the absence of clear evidence, it has generally been taken that both died in the same moment." Sir Herbert Jenner said: "The parties must be presumed to have died at the same time." (1 Curties, 705.)

These expressions only mean that as the fact is incapable of proof, the one upon whom the *onus* lies fails, and the persons thus perishing must be demed to have died at the same time, for the purpose of their property. The Lord Chancellor in Wing v. Underwood (*supra*), recognized the distinction, and explained the meaning of the rule. In commenting upon a similar expression of the Master of the Rolls to the effect that he must assume that Mr. and Mrs. Underwood both died together, the chancellor said: "From personal communication with his honor, I know that he is not aware that he ever used such an expression, and all he ever meant to say was that the property must be distributed just as it would have been if they had both died at the same moment." And Mr. Best in his work on Presumptions, after laying down the general rule, states, that it is not correct to infer from this that the law presumes both to have perished at the same moment,

and adds: "The practical consequence is however nearly the same, because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment."

All the common law authorities are substantially the same way, and the rule, which I think is wise and safe, should be regarded as settled. Its propriety is not weakened by the circumstance that its first application in this court prevents this estate from being turned into channels never contemplated or intended by the testatrix.

Judgment affirmed.

BURDEN OF PROOF.[1]

GIBSON, Admr. v. SWOFFORD.

122 Mo. App. 126. (1906)

ELLISON, J. The plaintiff is public administrator of the estate of W. C. Swofford, deceased, and the defendant is the father of the deceased. The son was married to Della E. Swofford and she was appointed administratrix of his estate and, as such, brought this action in replevin for a lot of personal property. She married and then the present plaintiff was substituted in her stead as plaintiff. The jury found for the plaintiff and assessed the value of the property at the time of the trial at $100 and likewise assessed the damages at $10.

There was no substantial dispute as to defendant's having the property and that originally it belonged to his son. He, however, claimed to have purchased a part of it of the son prior to his death. Ordinarily, the burden of proof is on the plaintiff, but on issue as here presented it devolved upon defendant to show that he bought the property of his son. Instructions on this head were proper.

Judgment affirmed.

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[1]Hughes on Evidence, p. 15.

STATE ex rel. LEONARD v. ROSENTHAL.

123 Wis. 442. (1905)

This is an action of *quo warranto* brought by the relator to remove from the office of assessor of the village of West Allis the respondent, August Rosenthal.

WINSLOW, J. The trial court charged the jury upon the subject of the burden of proof as follows:

"The burden of proof in this case as to all the material facts necessary to sustain the plaintiff's claim is upon the plaintiff. He must show or prove by competent evidence, so as to satisfy your minds by a preponderance of all the evidence, that such facts exist as alleged by him—that is, the plaintiff contends you should answer them, you must be satisfied by a preponderance of all the evidence that his contention is correct.

"The defendant has alleged, among other things, that he received the greatest number of votes cast by the duly qualified electors of said village for the office of assessor. The burden of proof in this action as to all the material facts necessary to sustain the defendant's allegations is upon the defendant. He must show or prove by competent evidence, so as to satisfy your minds by a preponderance of all the evidence, that such facts exist as alleged by him— that is, the defendant has the burden of proof as to such matters, as he alleges—and, in order for you to answer the questions which will be submitted to you as the defendant contends you should answer them, you must be satisfied by a preponderance of all the evidence that his contention is correct."

"I further charge you, gentleman of the jury, it is conceded that the defendant received a certificate of election as assessor, issued by the proper officers, in proper legal form; and the jury is instructed that said certificate is *prima facie* evidence of the defendant's right and title to said office, and his said right and title to said office can only be overcome by some positive testimony that illegal votes sufficient to change the result of said election were cast and counted for the defendant. But when it shows by satisfactory evidence that the certificate does not state the truth as to the result of such election, the presumption in favor of the incumbent, based upon such certificate, is rebutted, and then the burden is thrown upon the defendant to establish his right to the office by other competent evidence, to show

that he has received an equal number or a greater number of legal votes than the plaintiff."

There is certainly confusion here, rather than helpfulness. The first portion of these instructions says, in effect, that the burden of proof is upon both parties at the same time. It was proven at the inception of the case that the defendant was declared elected by the board of canvassers of the election, and was holding the office under such determination. This created a presumption in his favor that he had received the number of votes stated in the certificate, and cast upon the relator the burden of showing the certificate was false, thus rebutting the presumption. When this has been done by competent evidence, it then devolves upon the defendant to establish his right (i. e., the fact that he received the greater number of votes) by other evidence, in order to prevent a judgment of ouster. State ex rel. Swenson v. Norton, 46 Wis. 332, 1 N. W. 22. These rules should have been given to the jury.

Reversed.

DORRELL v. SPARKS.

142 Mo. App. 460. (1910)

GRAY, J. November 17, 1908 the plaintiff filed in the office of the circuit clerk of Greene County, Missouri, his petition in this cause, to which the defendant in due time answered. On the 15th day of October, 1909, the cause was tried to a jury and a verdict in favor of the plaintiff, signed by nine of the jurors, returned. Judgment was entered upon this verdict, and the plaintiff, after an unsuccessful effort to obtain a new trial, appealed his cause to this court.

The burden of proof means the burden of establishing the case, and remains unchangeable throughout the entire case exactly where the pleadings originally placed it; that is, on him alone who has the affirmative, though the burden of the evidence may, during the trial, be shifted from scale to scale. (McCartney v. Ins. Co., 45 Mo. App. 373; Feurt v. Ambrose, 34 Mo. App. 360.)

In this case the petition alleged that the notes were the property of the estate of H. M. Simcox. The defendant admitted all the formal

parts of the petition and admitted that H. M. Simcox at one time was the owner of the notes, but that at a certain time he gave the notes to his wife, and delivered the possession of the same to her. Under this answer, there was but one disputed fact, and that was: Did the husband give the notes to his wife? If he did not, the plaintiff was entitled to recover; and if he did, he was not.

There being but one issue in the case, as we have just stated, and this issue being sharply drawn, the burden of proof being upon the defendant, his counsel was entitled to open and close the argument to the jury. (Grant Quarry Co. v. Lyons Const. Co., 72 Mo. App. 531; Absher v. Franklin, 121 Mo. App. 29, 97 S. W. 1002.)

Counsel for the respondent claims that the right to award the opening and closing argument is within the discretion of the court, and not grounds for reversal of the judgment. This is the general rule with the addition that the court will not reverse the judgment unless it is apparent that such refusal has produced a wrong to the party. (Reichard v. Ins. Co., 31 Mo. l. c. 520.)

The agreed statement of facts herein admit that both the plaintiff and the defendant introduced testimony tending to prove the respective issues. The verdict of the jury was not unanimous, but the plaintiff only succeeded in getting just sufficient members to return a verdict. A practicing lawyer of any experience recognizes the great value of the close case. And in a case like this one, where the court has told the jury that the burden of proving the only contested issue in the case is upon the defendant, and then has awarded the closing argument to the plaintiff's counsel, and a verdict is secured by the plaintiff by only nine of the jurors concurring therein, it seems that the burden of showing that defendant was not injured by the action of the court in refusing him permission to close the argument, should be upon the plaintiff.

The premises being considered, we are of the opinion that the court, in refusing defendant's counsel the right to open and close the argument, committed substantial error against the appellant, and for which he is entitled to have a new trial, and accordingly the judgment will be reversed and the cause remanded. All concur.

SCOTT v. WOOD.

81 Cal. 398. (1889)

HAYNE, C. This action was to recover under a contract between the plaintiff and the firm of Hobart, Wood & Co. for services as salesman. Pending the action Hobart died, and the case was continued against Wood as surviving partner. The plaintiff had a verdict, and the defendant Wood appeals from the judgment, and from an order denying a new trial.

The case turned upon the question whether, during a portion of the period in which the plaintiff rendered services his salary was $200 or $250 per month. Upon this question the evidence was confliction. The defendant testified that the salary had been fixed at $200 a month in the beginning of 1870, and the plaintiff testified that it had not. The court instructed the jury in relation to the matter as follows: "The jury are instructed that the defendants admit employing the plaintiff on July 3, 1869, at the rate of $250 per month, and that he worked for them continually until the first day of April, 1885; and that the burden of proof is upon the defendants to show that plaintiff's compensation was changed; that unless the defendants established by a preponderance of testimony that plaintiff, in 1870, or at some other time, agreed for the defendants during the years 1870 and 1871 at the monthly compensation of $200, then they must find for the plaintiff." This was excepted to, and is specified as error.

We think that the court erred in telling the jury that the defendant was required to have a preponderance of testimony upon the question mentioned.

The term "burden of proof" is used in different senses. Sometimes it is used to signify the burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. These burdens are often on the same party. But this is not necessary or always the case. And it is by no means safe to infer that because a party has the burden of meeting a *prima facie* case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him. This is illustrated by a very common case. Suppose that upon an issue as to the performance of a contract sued upon the plaintiff should testify to facts showing non-performance. In such case, if the defendant produced no evidence the plaintiff must prevail. This is often expressed by saying that the burden has shifted

to the defendant. And so it has in one sense. But suppose that the defendant should take the stand and deny the truth of the facts testified to by the plaintiff—oath being opposed against oath. Would it be correct to say that the defendant must have a preponderance of evidence? It most certainly would not. And this, though the "burden of proof" had been transferred to him. Nor would it be correct to say that the burden had "shifted back" to the plaintiff, if the burden of producing a preponderance of evidence was meant. For that never was on the defendant. The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue.

In the present case we think that the learned judge of the trial court fell into error from overlooking the distinction above pointed out. Why was the defendant required to have a preponderance of evidence? Did he have the affirmative of the issue? We think not.

We advise that the judgment and order appealed from be reversed, and the case remanded for a new trial.

BUSWELL v. FULLER.

89 Me. 600. (1897)

PETERS, C. J. This is an action of replevin for a horse that was distrained by a town collector for a tax against the plaintiff. The horse, having been kept four days by the collector, while about to be sold by him at auction was replevied by the owner upon the ground that the horse had not been properly cared for during the four days; the owner alleging that the horse was sound when distrained, and had been injured during the time of his detention by the negligence of the collector. The owner claims the fault of the horse's hip got out of joint by some accident caused by the fault of the collector. Upon this issue of negligence the case was tried and a verdict rendered for the defendant.

The only exception, out of several taken, which is now relied on is that relating to the burden of proof. The plaintiff asked the court to instruct the jury, "that the defendant was bound to produce the distress at the time and place of sale in as good order and condition as when he distrained it, and that if the distress was injured while in

his custody, so to render it of less value, the defendant became a wrongdoer and the burden was upon the defendant to show that he was not at fault."

The presiding justice ruled that the burden of proof was upon the plaintiff to establish the fact, by preponderance of testimony, that the horse was injured because the defendant did not exercise the due and proper care for the distraint while in his custody.

Generally the burden of proof upon any affirmative proposition necessary to be established as the foundation of a suit does not shift from plaintiff to defendant, while the burden of evidence, or the burden of explanation, may shift from one side to the other according to the testimony. There is a manifest distinction between the burden of proof and the burden of evidence. How far the burden of evidence may bear upon a party to a litigation is usually more for the jury to determine as a matter of fact than for the ruling of the court as matter of law.

Generally, where a plaintiff, as his cause of action, alleges negligence against a defendant, the burden of proof is upon the plaintiff throughout the trial, even though in instances the burden of evidence may change. And very many English and American cases hold the doctrine that the rule, requiring that a plaintiff who alleges negligence must affirmatively prove it, applies in any case of bailment where the bailor sues the bailee for not returning the articles bailed in suitable condition, or does not even return them at all, at the time when the bailee was to turn them over, and that an omission so to do does not of itself establish the bailee's negligence or default. But this doctrine is stoutly opposed by other strong and leading authorities. Judge Story in his book on bailments espouses the doctrine, and Dr. Wharton in several of his treatises bluntly opposes it. The idea on which the doctrine is grounded is that negligence is not to be assumed or presumed, but must be proved, and in the case of an officer the theory is made stronger, perhaps, because it is aided by the presumption that an officer, who has no motive to commit wrong, is presumed to act correctly.

And still there is really something illogical and unnatural in saying, if a person to whom I commit my property to keep for me neglects to return it to me when demanded of him, that I rather than he must show the cause of his default; that I, knowing nothing of the cause for the neglect of my bailee to return my property must give the explanation rather than he give the explanation who knows all about it. The folly of the rule, if applied literally, is vigorously assailed by

Peckham, J., in Collins v. Bennet, 46 N. Y. 480, in the case of a hired horse returned to the bailor in a foundered condition.

And so it is that many courts have attempted to qualify the rule by annexing exceptions to it. Judge Story thought there might be an exception in complicated cases, and he would apply the rule in the law of bailments and not to common carriers, and that eminent jurist intimates that an exception should obtain in a case where the bailor demands a thing loaned, and the bailee makes a general refusal without offering any special excuse therefor. Story, Bailments, 213, 298. The Pennsylvania Court in Clark v. Spratt, 10 Watts, 335, places the burden of explanation on the bailee so far as to say that he is required to show that the goods have been lost and the manner they were lost, although the presumption is that a bailee has been faithful to his trust, and that the general burden of proof, after this exposure of facts by the bailee (in court or out of court we assume) rests upon the bailor to show the contrary. This case was approved by this court in Mills v. Gilbreth, 47 Maine, 320, a case in principle very much like the present.

There are two doctrines, therefore, to be found in the books on this subject—one that the burden of proof shifts, and the other that it does not. But those who maintain the latter position admit that, while the general burden of proof does not change, if a bailor does not get any account of the loss of, or an injury to, the articles bailed, the proof of the fact of demand and refusal without such explanation will make out a *prima facie* case for the bailor, and a conclusive case unless the bailee assumes the burden of evidence and shows facts proving the contrary. Mr. Schouler, in his valuable work on bailments, discusses this vexed and rather intricate question very instructively, and adduces the leading authorities on both sides. In a note he undertakes to construct a test which will be in consonance with the rule and its complicated exceptions. Schouler, Bailments, 22, 23, 24, and note.

Exceptions overruled.

CENTRAL BRIDGE CORPORATION v. BUTLER.

68 Mass. 130. (1854)

Assumpsit for tolls. Plea, the general issue. Trial in the court of common pleas, before Hoar, J., when the plaintiffs introduced evidence

that the defendant, who resided in Lowell, and his servants, with horses, carriages and other vehicles, within the time mentioned in the writ, often passed over the plaintiffs' bridge from Lowell to Dracut, without paying the tolls granted to the plaintiffs by law.

The defendant contended that he was not liable to pay toll, because he and his servants passed the bridge on the way to and from the lands named in a vote of the plaintiff corporation, purporting to exempt from the payment of toll certain persons named, and all persons who might thereafter have their homes upon certain lands in Dracut, and all persons going to or from any of said lands upon the business, of any person owning or having his home thereon, and all carriages, etc., going to or from any of said lands upon such business, or for the purpose of conveying any of said persons to or from the lands described.

A witness called by the defendant testified that he and another person had been permitted to pass the plaintiffs' bridge, without paying tolls to go to the house of Dr. Hildreth, the father-in-law of the defendant, in Dracut, to which it was admitted that the defendant and members of his family frequently went, over the plaintiff's bridge. The plaintiffs objected to the admission of this testimony; but their objection was overruled.

The plaintiffs asked the judge to rule that the passing of the plaintiffs' bridge by the defendant, without paying toll, being proved, the burden of proof was upon the defendant to prove that he had a right to pass the bridge without paying toll, and that no such defense was open to the defendant on the general issue. But the judge ruled that the burden of proof was upon the plaintiffs, to prove not only the passing of the bridge by the defendant, but also that he had not the right to do so by virtue of the vote above mentioned.

The jury returned a verdict for a part only of the plaintiffs' claim; and the plaintiffs alleged exceptions.

BIGELOW, J. It was incumbent on the plaintiffs to prove a liability on the part of the defendant to pay the tolls which they sought to recover in this action. For this purpose they relied on the implied assumpsit arising from proof that the defendant had passed their bridge without paying the usual tolls. This made out a *prima facie* case, and would entitle them to recover unless the defendant offered some evidence to rebut it. But it does not follow that the burden of proof was thereby shifted. On the contrary, in the absence of any matter in avoidance or discharge, the fact to be proved remained the same. By showing that certain persons were by the votes of the corporation exempt from toll, and by proof tending to show that the de-

fendant was included among them, he only endeavored to meet and overthrow the case which the plaintiffs, by their evidence, had sought to establish. The plaintiffs averred the legal liability of the defendant to pay tolls. To this averment the evidence on both sides was directed; and as the plaintiffs affirmed it as the foundation of their claim, so they were bound to sustain it by proof in all stages of the trial.

The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in the support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established. In the case at bar, the averment which the plaintiff was bound to maintain was, that the defendant was legally liable for the payment of tolls. In answer to this, the defendant did not aver any new and distinct fact; such as payment, accord and satisfaction, or release; but offered evidence to rebut this alleged legal liability. By so doing, he did not assume the burden of proof, which still rested on the plaintiffs; but only sought to rebut the *prima facie* case which the plaintiffs had proved against him. The ruling of the court on this point was therefore right.

Exceptions overruled.

CODY v. MARKET ST. RAILWAY CO.

148 Cal. 90. (1905)

ANGELLOTTI, J. This is an action for damages for personal injuries, alleged to have been received by plaintiff through the negligence of defendant while alighting from one of defendant's cars, upon which she was a passenger. She obtained judgment for seven hundred and fifty dollars, and defendant appeals from an order denying its motion for a new trial. The only points made on this appeal relate to the action of the trial court in the matter of instructing the jury.

The trial court, at the request of plaintiff, instructed the jury as follows, viz: "The rule concerning the obligations of common carriers of passengers is thus stated by the Supreme Court of this state in McCurrie v. Southern Pacific Co., 122 Cal. 561, (55 Pac. 325): 'The carriers of passengers are required to exercise the highest degree of

care in their transportation, and are responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part.'" It is claimed that the court erred in giving this instruction.

It is suggested that the effect of this instruction was to make it incumbent on defendant to overcome the showing of plaintiff by a preponderance of evidence, whereas under the universally recognized rule no verdict could be rendered for plaintiff in the absence of a preponderance of evidence showing negligence on the part of defendant. That this contention is not well founded is shown by the opinion of this court in several cases where the question has been discussed. Such an instruction simply informs the jury that, when the facts stated therein are shown, a presumption of negligence on the part of the carrier arises, which is sufficient to make out a *prima facie* case for the plaintiff, and require the defendant to meet the case thus made, or, in other words, to answer the *prima facie* case, or it will prevail. But it does not require a defendant to show want of negligence by a preponderance of evidence. It does no more than to require him to make such showing as to want of negligence as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part, and if on the whole case the scale does not preponderate in favor of the presumption of negligence and against the defendant's proof, plaintiff is not entitled to verdict, for he has not established his case by a preponderance of evidence, as he was compelled to do under the well-settled rule. The term "burden" or "burden of proof" is frequently used to signify simply the burden of meeting a *prima facie* case, rather than the burden of producing a preponderance of evidence, and as used in the instruction in question imported nothing more. The distinction is clearly shown in the opinions of this court in Scott v. Wood, 81 Cal. 398, 400, (22 Pac. 871); Patterson v. San Francisco etc. Ry. Co., (Cal.) 81 Pac. 531, 533; and Kahn v. Triest etc. Co., 139 Cal. 340, 344, (73 Pac. 164). Upon the proposition that it was necessary for the plaintiff to prove her case by a preponderance of evidence, the trial court correctly instructed the jury that they should find a verdict for the defendant "unless the plaintiff has shown by a preponderance of the evidence that she was

injured by the negligence of the defendant," and there could not reasonably have been any misunderstanding on the part of the jury as to the meaning of the instruction complained of. It is the settled law in this state that such an instruction may properly be given where the circumstances of the case justify it, and that it is not open to the objection under discussion. (Osgood v. Los Angeles Traction Co., 137 Cal. 280, 283, (79 Pac. 169, 92 Am. St. Rep. 171); Green v. Pacific Lumber Co., 130 Cal. 435, 440, [62 Pac. 747].) The instruction correctly stated the law applicable to common carriers of passengers (McCurrie v. Southern Pacific Co., 122 Cal. 558, 561, (55 Pac. 324), and the rule stated therein is as applicable to street-railway companies as it is to other carriers. (Bosqui v. Sutro Railroad Co., 131 Cal. 390, 400, [63 Pac. 682].)

The order denying the motion for a new trial affirmed.

SHAW, J., and VAN DYKE, J., concurred.

DIETERLE v. BEKIN.

143 Cal. 683. (1904)

GRAY, C. This is an action for damages for the conversion of certain personal property belonging to the plaintiffs, and in the complaint alleged to have been delivered to defendant in the ordinary course of business for storage in his warehouse in the city of Los Angeles. The complaint alleges that subsequent to the storage, plaintiffs being still the owners of said property and entitled to its possession, demanded possession thereof, and defendant refused to comply with the demand.

The answer, in addition to numerous denials, sets up as a separate defense that the property was deposited for storage with the defendant, and that thereafter and before any demand was made upon the defendant, the said personal property "was without fault or negligence of this defendant destroyed by fire."

The defendant also pleaded as a separate defense that he received the property under a written agreement to the effect that the "defendant should be under no liability for loss of said personal property by fire."

The findings substantiate the allegations of the complaint, except as to the value of the property, which is found to be fifteen hundred dollars.

Upon these findings the defendant had judgment for costs. The plaintiffs appeal from said judgment and from the order thereafter made denying their motion to vacate said judgment and enter a different judgment in plaintiff's favor for fifteen hundred dollars.

We think the judgment should be reversed.

The plaintiffs made out their case when they established to the satisfaction of the court the allegations of their complaint. It was then for the defendant to establish the allegations of his affirmative defense if he could do so. The court has found that he was grossly negligent in the matter of exposing the property to loss by fire, and that the property was destroyed by fire of an unknown origin. The facts found suggest at least a probability that the fire came from the same source from which emanated the "more than ordinary risk" under which the property was so negligently placed by the defendant. Under the circumstances disclosed by the findings, the burden which the defendant had assumed in his affirmative defense was upon him to satisfy the court that the fire did not come from this source.

It is not necessary to hold that the burden of proof was upon the defendant solely for the reason that he had assumed it in his answer. Irrespective of any consideration upon whom the burden of proof lay, the issue before the court was to determine whether the defendant had exercised the ordinary care required of him as a warehouseman, and whether his negligence in that respect had contributed to the loss of the plaintiffs' property, and upon this issue the court has not made any finding. Whether the fire occurred without his knowledge, or whether the origin of the fire was unknown, were not in themselves conclusive of this question. The character of the building provided by him for the storage of the property, the character of the business for which he had permitted a portion of the building to be used, and in view thereof the precautions taken by him for the prevention of fire and for its extinguishment were also elements proper to be considered in determining this issue.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the lower court to make a finding upon the evidence already before it and such other evidence as the parties may present upon this issue as to defendant's negligence, and to render judgment accordingly.

HINSHAW, J., LORIGAN, J., MCFARLAND, J.

ST. LOUIS & S. F. R. CO. v. DREYFUS et al.

42 Okla. 401. (1914)

Opinion by HARRISON, C. This is an appeal from a judgment rendered upon two separate causes of action based upon an alleged negligence in delivery of two separate shipments of bananas. There was no separate finding as to liability in each shipment, but a general verdict for the sum of $314.12 was found in favor of plaintiffs below. The grounds for reversal arose from the issues involved in the first cause of action, which was based upon the allegation that, by the careless and negligent failure to deliver a car of bananas, the fruit became frozen and damaged to the amount sued for. The carrier defended on the ground that the damage was not the result of the carrier's negligence, but the result of a severe snowstorm which froze and blocked up the switches and covered the tracks to such an extent that the car could not be delivered sooner than it was. The facts are that the car of fruit arrived at Tulsa between seven and eight o'clock on the evening of the 15th of February; that during the night of the 15th a blizzard and snowstorm came up and the weather turned severely cold; that the blizzard raged throughout the day and night of the 16th, and the car was not set at plaintiffs' warehouse until the 17th.

The decisive issue of fact in this case was whether the storm was in fact so severe that the carrier could not have set the car at plaintiffs' warehouse on the 16th, and thereby averted the loss. This court in M., K. & T. Ry. Co. v. Johnson, 34 Okla. 582, 126 Pac. 567, held:

We think the facts that the company was operating passenger trains, and the testimony that a switch engine was seen operating in the yards during the day of the 16th, and the fact that the car was delivered on the 17th, which it is admitted was colder than the 16th, were sufficient to raise the issue as to whether the carrier, by the exercise of reasonable efforts, could have delivered the fruit on the 16th, and that it was not improper to submit such issues to the jury.

But the court, in paragraph 6 of its charge, instructed the jury as follows:

"The court instructs the jury that the burden of proof is upon the defendant to satisfy the jury by its evidence, not only that the loss sustained by the plaintiff in its first cause of action was occasioned by the act of God, but also that the defendant exercised due care and diligence in the performance of its duty and was not in any manner

negligent in doing or omitting to do any act that might have averted the loss."

This instruction was excepted to by defendant and presented as ground for reversal in the original brief of the company, but the error in this instruction was overlooked in the original opinion on which the judgment of the lower court was affirmed. But in the petition for rehearing the error contended for therein is pointed out with more clearness and argued with more force, and, upon reconsideration of this instruction, we believe the contention of plaintiff in error should be sustained. This instruction unqualifiedly places the burden upon the defendant to satsfy the jury that the loss was occasioned by an act of God, and to further satisfy them that the loss could not have been averted by the exercise of all due care and diligence. The burden was not on the defendant until plaintiffs had made a *prima facie* case which, without further proof, would have entitled them to recover. And the question of defendant's negligence in the failure to deliver the car on the 16th being a close question of fact, it is readily seen that the jury could have been easily misled by the foregoing instruction, especially so since it was unqualified by any other paragraph in the charge. The correct rule as to the burden of proof in such cases is stated by this court in Armstrong, Byrd & Co. v. Ill. Cent. R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A. (N. S.) 671, wherein the principal question was the burden of proof. The court in the syllabus, after defining what constitutes a *prima facie* case, says:

"(a) The carrier, by proving the damage was due entirely to the flood or act of God, overcomes such *prima facie* case, and the burden shifts to the shipper, then, to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment, in order to recover."

For the error contained in the above instruction, the former opinion, affirming the judgment, is withdrawn, and this one filed instead, and the judgment reversed, and the cause remanded.

By the court: It is so ordered.

FOSS v. McRAE.

105 Me. 140. (1909)

Action on an alleged guaranty by the defendants' testator of the payment of some fifty overdue promissory notes transferred by him to the plaintiff.

SPEAR, J. This case comes upon exceptions to instructions given by the presiding justice to the jury. The case does not show but, inasmuch as the exceptions are by the plaintiff, we assume that the verdict was for the defendant.

The case involved an action on the alleged guaranty by the defendants' testator of the payment of certain over-due promissory notes transferred by him to the plaintiff. To sustain her allegations the plaintiff offered in evidence a typewritten instrument bearing the signature of the defendant's testator of the following tenor:

"Machias, Maine, April 11, 1907.

This is to certify that I have this day in a settlement of business transacted with Mary E. Foss, conveyed and sold to her a lot of notes for which I have received payment in full. And will guarantee them.

(Signed) Asa T. McRae. (Witness) M. E. McRae."

The defendants had seasonably given written notice to the plaintiff of their denial of the execution of this instrument, and at the trial, the subscribing witness, who was one of the defendant's executors, testified that at the time of the execution and delivery of the instrument it did not contain the last four words "And will guarantee them." There was also evidence upon both sides of this issue.

The plaintiff contended that upon this issue the burden of proof was upon the defendants, but the presiding justice instructed the jury as follows, viz:

"So the question is narrowed right down to this: Were those words, the final four words in this paper, written on there when Mr. Asa T. McRae signed that paper? And the burden is upon the plaintiff, Mrs. Foss, or her agents, who conduct the suit, to convince you by evidence that in fact and in truth those words were upon that paper when signed by Asa T. McRae; and has she done so? She claims that she has, and she first relies upon the circumstances that the words are found to be on the paper now.

That is *prima facie*. By *prima facie* we mean that, if nothing more appeared, if that was all there was, just the paper itself, with no con-

tradiction, it would be taken as sufficient evidence that they were there when signed; but, it appearing that it is disputed that they were there, being some evidence to the contrary, the burden is still upon the plaintiff throughout to convince you by evidence that, upon the whole, you believe the words were there when signed."

The instructions were correct. The plaintiff under the notice and rule was required to prove the execution of the instrument upon which she sought to recover. To accomplish this, the subscribing witness was put upon the stand. His evidence clearly developed the real issue in the case. When he had testified to the execution of the paper, as we presume he did under the notice, the plaintiff had established a *prima facie* case, as the words in dispute appeared upon the face of the paper whose execution had been proved. Had the case stopped here the plaintiff would have been entitled to recover. This is precisely what the presiding justice instructed the jury at this stage of the proceedings. But the case did not stop here. The very witness the plaintiff relied upon to prove execution, testified that the disputed words—the substance of the plaintiff's case—were not upon the instrument when he witnessed the defendant's signature. Again, it is apparent, if the case had stopped at this point, the defendant would have been entitled to the verdict, as the testimony of the witness, showing a material alteration, is undisputed and must therefore prevail. Hence, it follows that it was incumbent upon the plaintiff, to entitle her to recover, to proceed further and introduce evidence tending to overcome the testimony of the attesting witness.

The issue of alteration now having been raised, it became her duty to assume the burden upon all the evidence of persuading the jury that the words of guaranty were upon the paper when it was executed.

Now, while the burden of evidence may be said to have shifted from the plaintiff to the defendant, when she had made out a *prima facie* case, and from the defendant to the plaintiff, again, when their evidence had overcome the *prima facie* case, the burden of proof had not changed at all. It was incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the truth of the allegation upon which she sought to recover, that the instrument contained the disputed words.

"Burden of proof" and "burden of evidence" are often confused. The phrase, burden of proof is in fact more philosophical than practical.

It means generally that a plaintiff, however often the evidence shifts, must upon the whole, persuade the jury, by legal evidence, that his

contention is right. The risk of non-persuasion is all the time upon him. If he fails to persuade, he loses his case. This risk of non-persuasion is the burden which he must assume.

Exceptions overruled.

Note. The term "burden of proof" is used in a double sense. This has caused much confusion in the decisions (Supreme Tent v. Stensland, 206 Ill. 124, 99 Am. St. Rep. 137). In its primary and true sense it means the duty of establishing one's case. In its secondary sense it means the duty of going forward with evidence. This confusion would be eliminated by restricting the use of the term to its primary meaning and using the term "burden of evidence" when referring to the duty of going forward with evidence.

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